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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 437

WILLIAM W. SELLERS, The SELLERS COMPANY, INC., and SELLERS SERVICE, INC.

Petitioners,

v.

TIME, INC.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The Petitioners, William W. Sellers, The Sellers Co., Inc. and Sellers Service, Inc., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in this proceeding on March 20, 1970.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 423 F.2d 887 (1970). The Opinion of the District Court is reported at 299 F. Supp. 582 (1969).

J U R I S D I C T I O N

The judgment of the United States Court of Appeals for the Third Circuit was entered on March 20, 1970, affirming the District Court's entry of summary judgment against Petitioners on a motion to dismiss the Complaint dated May 12, 1969. Petitioners filed a timely petition for rehearing by the Third Circuit on April 3, 1970, which was denied on April 24, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 to review the judgement of the Third Circuit Court of Appeals, which contravenes state law and violates the Seventh Amendment.

QUESTIONS PRESENTED

1. Did not the Court of Appeals commit reversible error when it misapplied established state law of defamation by holding that the Time magazine article was legally incapable of a defamatory meaning?

2. Did not the Court of Appeals commit reversible error and violate the Seventh Amendment of the United States Constitution by holding that

Petitioners' case was insufficient to go to the Jury?

3. Did not the Court of Appeals commit reversible error in failing to remand the case to the District Court on the issue of invasion of privacy?

4. Does an article in a national magazine, which defames a person not prominent in public life by falsely and unfairly describing him and an unusual golfing accident and subsequent legal proceedings related thereto, qualify for the protection of either the constitutional privilege under New York Times v. Sullivan or common law privileges under state law? (Answered in the affirmative by the District Court. Not ruled upon by the Court of Appeals.)

STATUTES INVOLVED

The Constitution of the United States, Amendment Seven provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court in the United States, than according to the rules of the common law."

STATEMENT OF THE CASE

This case is a diversity action brought in the United States District Court for the Eastern District of Pennsylvania for libel and invasion of privacy emanating from an article published

in the May 6, 1966 issue of Time Magazine.

The issues raised by this appeal have significant and far reaching interests - both private and public.

The private interests relate to an individual's right to seek redress from a jury of his peers by an action for defamation or invasion of privacy against a powerful national publication which holds him up to public ridicule and portrays him in an unfair, untrue and damaging light.

The public interest turns on the scope of constitutional privilege protecting free speech - and the significant public interest in preserving private defamation actions, with punitive damages, as one of the last effective means to insure that journalists are fair, responsible and accountable for their stewardship in the public interest. We stake the very survival of a free democratic society on people informed by a fair and responsible press. The Court must strike a delicate balance to preserve freedom of the press and still maintain an individual's right of redress for the publication of irresponsible, unfair, unwarranted and damaging material.

Petitioner William W. Sellers, a citizen of Pennsylvania and a successful small businessman, is President of The Sellers Co., Inc. and Sellers Service, Inc., both Pennsylvania corporations and plaintiffs in the action below. Time, Inc., a New York corporation and citizen, owns and publishes a weekly magazine, Time, widely sold and read in Pennsylvania, throughout the United States and in many foreign countries.

On June 9, 1964, Time published an article about Sellers purportedly reporting on a decision in a personal injury suit brought against Sellers,

arising out of a golfing accident. While playing golf in a foursome, Sellers had hit a drive, which took an erratic flight and hit a golfing companion in the left eye, blinding him in that eye for life.

In the negligence action brought by the injured companion against Sellers, the trial court denied Sellers' motion to dismiss the action under the assumption of risk doctrine. Construing all the facts most favorably to the non-moving party, the court thought that plaintiff was not within the apparent orbit of the shot.

Time first learned of this uneventful decision from a report in 34 Law Week 2563. Time then requested its Philadelphia correspondent to "... quickly read through the decision for circumstantial color. If enough there, simply mail decision. If not, please add a little color." (R. 38)*. The local correspondent prepared and submitted a reasonably accurate account of the facts of the accident (R. 39). Time's editors then reworked the article, adding "color" by fabricating facts out of whole cloth, which Sellers found defamatory and damaging to himself and his business. The article, entitled "Duffer's Dilemma," appearing in the Law Section, unjustly held Sellers up to the view of millions of Time readers who had previously never heard of William Sellers.

"NEGLIGENCE"

'Duffer's Dilemma

'William Sellers runs a heating-equipment company near Philadelphia, and he plays

* All Record References are to the Appendix Filed with the Court of Appeals.

golf for business rather than pleasure. One June day in 1964, Sellers' game was running true to form at the Manufacturers Golf and Country Club in Oreland, Pa. At the third tee, his mind on a potential deal, Sellers hit the ball so awkwardly that it flew to the rear and struck one of his partners, James Walsh, sales manager of the tank division of Bethlehem Steel in Dunellen, N.J. As a result, Walsh was blinded in his left eye.

"Since Sellers was working while golfing, Walsh sued both him and his company for $250,000 claiming that Sellers had negligently failed to wipe his hands before swinging, causing the club to slip. In answer, Sellers moved to have the suit dismissed on a seemingly unassailable ground: anyone who ventures on a golf course 'assumes the risk of being struck by a ball' and is thus barred from seeking damages.

'To everyone's surprise, Seller's motion was shot down by Judge Alfred Luongo of the Philadelphia U.S. District Court, which had jurisdiction because Sellers and Walsh live in different states. Judge Luongo readily agreed that every golfer 'assumes the risk or is guilty of contributory negligence if he intentionally or carelessly walks ahead or stands within the orbit of the shot of a person playing behind him.' But when the ball struck Walsh, said the judge, he was sitting in a golf cart 20 ft. to Sellers' rear - a place of supposedly perfect safety. As a result Walsh cannot be said to have 'voluntarily assumed the risk' of being partly blinded. Ruled the judge: Duffer-Defendant Sellers must stand trial."

The article, read as a whole, casts Sellers in

an unfair, false, and damaging light. It portrays a man who does not enjoy golf, but plays to get business. It tells of a man who was so self-centered, so preoccupied with thoughts of making money, and so inconsiderate of his companions that, while in the act of making a tee shot, he had his mind on a potential business deal and not on his game, thus hitting the ball so awkwardly that it struck his companion in the eye, blinding him for life.

In point of fact, Sellers is a quiet, happily married family man who, among other things, plays golf for pleasure, not business (R. 62). Through his own hard work and honest dealing, Sellers has built up a favorable reputation for himself, his products, and his companies. He encourages his salesmen to sell the company products on their own merits - and not by attempting to capitalize on personal relationships.

By falsely characterizing Sellers as an inconsiderate, irresponsible person bent on using a game of golf for personal gain, defendant has damaged Sellers both personally, and as a business man, has damaged his companies' reputations as prudently managed enterprises, and has unjustly interferred with Sellers' right to privacy.

Defendant Time moved for summary judgment, which the District Court granted on the sole ground that"...the article comes within the common law and constitutional privileges previously set forth." 299 F. Supp. 585.[1]

[1](See Note, Sellers v. Time, Inc. 43 Temple L.Q. 250 (1970) which attacks Judge Kraft's decision as an unwarranted extension of the privilege doctrine formulated in Times v. Sullivan, Curtis Publishing Co. v. Butts & Associated Press v. Walker, 388 U.S. 130 (1967).

Recognizing the unsettled state of the law with respect to the rules of constitutional privilege enunciated by the Supreme Court in New York Times Co. v. Sullivan, 376 U.S. 254 (1964) and other cases, and the need for appellate clarification, the District Court took steps to clear the way for swift appellate review of the privilege issues, as revealed by the following passage:

> "However, because there are serious constitutional questions involved in this case which should be reviewed by the Court of Appeals in the interest of improving the administration of justice, we will direct that plaintiff's Complaint also be dismissed so that our order will be a final judgment and therefore subject to appeal." (emphasis supplied). 299 F. Supp. 587.

On May 16, 1969, Petitioners filed their notice of appeal to the Court of Appeals for the Third Circuit. On March 20, 1970, in an opinion by Judge Seitz, joined in by Forman, J. and Adams, J., the Third Circuit affirmed the lower court on the mistaken and erroneous assertion that the District Court had ruled that the article was not capable of a defamatory meaning under Pennsylvania law. Thus, the Third Circuit held that the constitutional and common law issues of privilege were moot, thereby evading the vital question of privilege raised in the District Court holding.

Petitioners filed a timely Petition for Rehearing, which was denied by the Third Circuit on April 24, 1970.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS ERRED BY MISCONSTRUING THE DISTRICT COURT'S OPINION

In its opinion, the Court of Appeals erroneously

states that the District Court invoked three grounds for dismissing Seller's Complaint - that the article was not capable of a defamatory meaning, and that it was privileged both under Pennsylvania law and under the First Amendment. This reading of the District Court's opinion is patently erroneous. The District Court only held that the article came within the protective scope of common law and constitutional privileges.

Judge Kraft would not have taken the deliberate steps he did to aid appellate review of the important constitutional issues of privilege in the case if he had held at the outset that the article was incapable of a defamatory meaning.

Secondly, even if off-hand remarks are mistaken for a holding that the article was not capable of a defamatory meaning, the standard used by Judge Kraft in making that judgment is clearly wrong. In order for a statement to be incapable of a defamatory meaning, the Court must find that, if read in the light most favorable to plaintiff's position, no reasonable person could interpret the article so as to blacken plaintiff's reputation or to injure him in his business, trade, or profession. See, e.g. Bocchicchio v. Curtis Publishing Co., 203 F. Supp. 403, 409 (E.D. Pa. 1962); Rogash v. Elkins, 405 Pa. 437, 440, 176 A.2d 677, 678-9 (1962). Judge Kraft did not use that stringent test. Moreover, "any reader's" impression of Sellers is legally irrelevant, because Pennsylvania law is concerned only with the impact of the article on the audience reached by the publication - i.e. the average Time reader. Boyer v. Pitt Publishing Co., 324 Pa. 154, 188 At. 203 (1936). Judge Kraft's loose remarks are not based on such a standard.

Thus, the Court of Appeals' opinion entirely misapprehended the lower Court's holding, evaded the vital issues of common law and constitutional

privilege, which formed the basis for the District Court's holding, and failed utterly to follow Pennsylvania law which requires that the facts in the instant case be submitted to a jury for its determination of whether the statements were defamatory or an invasion of privacy.

II. THE COURT OF APPEALS MISAPPLIED STATE LAW OF DEFAMATION IN HOLDING THAT THE ARTICLE WAS INCAPABLE OF A DEFAMATORY MEANING.

In order to establish that there is an issue of fact that should be reserved for the jury's consideration, the plaintiff must show that the publication in question is capable of being reasonably interpreted as defamatory. The initial determination - whether the article was reasonably capable of a defamatory meaning - is for the Court under applicable Pennsylvania case law. (Bocchicchio v. Curtis Publishing Co., 203 F. Supp. 403, 409 (E.D. Pa. 1962); Arvey Corp. v. Peterson, 178 F. Supp. 132, 135 (E.D. Pa. 1959); MacRae v. Afro-American Co., 172 F. Supp. 184, 186 (E.D. Pa. 1959); Bogash v. Elkins, 405 Pa. 437, 440, 176 A.2d 677 (1962). See also Restatement of Torts, §614 (1938).) Once the Court determines that the article is capable of a defamatory meaning, it is the province of the jury to decide whether the article was in fact defamatory under the circumstances of the instant case. (See cases cited supra.)

A communication is defamatory if it tends to harm the plaintiff's reputation by lowering him in the estimation of the community, if it tends to deter third persons from associating or dealing with him (MacRae v. Afro-American Co., 172 F. Supp. 184, 187 (1959); Hirl v. Philadelphia Electric Co. Torts §559 (1938), if it exposes the plaintiff to contempt, ridicule, hatred, or degradation of character (Schnabel v. Meredith, 378 Pa. 609, 107 A.2d 860 (1954); Hubbock v. Daily News Publishing Co., 74 Pa. Super. 429 (1920).), or injures him in

his business, trade, or profession (Bogash v. Elkins, 405 Pa. 437, 176 A. 2d 677, (1962).) The fact that words which produce any perceptible injury are also susceptible of an innocuous meaning is irrelevant as long as they are also reasonably capable of a defamatory meaning. MacRae v. Afro-American Co., supra; Arvey Corp. v. Peterson, supra; Boyer v. Pitt Publishing Co., 324 Pa. 154, 188 A. 203, (1936).

The Court can only take the case away from the jury if it finds that, construing the facts in the light most favorable to plaintiff's position, reasonable men could not differ on the non-defamatory nature of the communication. Bocchicchio v. Curtis, supra; Friday v. Official Detective Stories, Inc., 233 F. Supp. 1021 (E.D. Pa. 1964); Volomino v. Messenger Publishing Co., 410 Pa. 611, 189 A.2d 873 (1963); Restatement of Torts, §614, Comment b (1938).

An examination of the Court of Appeals' Opinion reveals that the Court ignored these strict requirements for finding an article incapable of a defamatory meaning. Rather, the Court used a much lower standard for determining this issue - it erroneously assumed that an article is incapable of a defamatory meaning if the average Time reader would "probably" not think any less of Sellers after reading "Duffer's Dilemma". See page seven of the Third Circuit opinion reported at 423 F. 2d. 887, 891, which is replete with findings based on the equivocal standards of bare probability, belief and likelihood, all of which do not meet the test of incapability.

Pennsylvania law requires a great deal more than problematical beliefs to dismiss a Complaint for defamation. Thus, the Court of Appeals committed reversible error in failing to apply the correct standard for dismissing the Complaint.

III. THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONERS' CASE WAS INSUFFICIENT TO GO TO THE JURY AND THUS THE COURT VIOLATED THE SEVENTH AMENDMENT RIGHT TO JURY TRIAL

Petitioners maintain that they presented a submissible case according to the decisions of this Court and other Courts of Appeal, including those of the Third Circuit.

The rule with respect to the determination of the presence of a jury question has been defined by this Court in numerous cases - "where the facts are in dispute and the evidence in relation to them is that from which fair-minded men may draw different inferences, the case should go to the jury". Tiller v. Atlantic Coast Line R. Co. 318 U.S. 54 (1943). See also Continental Co. v. Union Carbide, 370 U.S. 690, 700-701 (1962). James, Sufficiency of the Evidence and Jury Control Devices Available Before Verdict. 47 Va. L. Rev. 218 (1961).

This Court has upheld a plaintiff's constitutional right to have his case passed upon by a jury where the facts are far less compelling than those in the present action. In Schultz v. Pennsylvania Railroad Co., 350 U.S. 523 (1956), petitioner brought suit for damages under the Jones Act to recover for the death of her husband, a tugboat fireman, who disappeared while walking at night on four unlighted, icy tugboats and whose drowned body was latter recovered near the boats.

The District Court directed the verdict for defendant for lack of any evidence connecting deceased's death to defendant's alleged negligence. This Court granted Certiorai to consider the failure of the lower court to let the case go to the jury. 350 U.S. 882.

In reversing the rulings below, this Court

eloquently described the crucial function of the jury in passing upon difficult issues presented in negligence actions. The Court's words are equally apposite to a defamation and invasion of privacy action where the jury is, by necessity, required to weigh facts that defy precise measurement but require common sense judgment:

> In considering the scope of the issues entrusted to juries in cases like this, it must be borne in mind that negligence cannot be established by direct, precise evidence such as can be used to show that a piece of ground is or is not an acre. Surveyors can measure an acre. But measuring negligence is different. The definitions of negligence are not definitions at all, strictly speaking. Usually one discussing the subject will say that negligence consists of doing that which a person of reasonable prudence would not have done, or of failing to do that which a person of reasonable prudence would have done under like circumstances. Issues of negligence, therefore, call for the exercise of common sense and sound judgment under the circumstances of particular cases. "(W)e think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others." Jones v. East Tennessee, V. & G.R. Co., 128 U.S. 443, 445, (1888).

This Court reaffirmed the principle expressed in Schultz, in Mercer v. Theriot, 377 U.S. 152 (1964), a wrongful death action brought in federal court on the basis of diversity. The Court of Appeals in Mercer reversed a jury verdict for Petitioner, plaintiff below, on the basis of lack

of evidence to sustain the verdict. This Court granted Certiorai and reversed. The Court observed that the jury could have found facts to support a verdict for plaintiff, even though there was no direct evidence that defendant had caused decedent's death. However, the Court held that under either state or federal standards for sufficiency of the evidence, there was enough evidence to support the verdict. See also, Dick v. N.Y. Life Insurance Co., 359 U.S. 437 (1959), where this Court granted Certiorai to review the Court of Appeals holding that there was insufficient evidence to justify submitting plaintiff's diversity action for double indemnity to the jury. This Court reversed; holding that there was sufficient evidence to send the case to the jury.

Guided by these decisions and the numerous Pennsylvania decisions in defamation actions, it is clear that the Court of Appeals erred in holding that Petitioners failed to make out a case for the jury.

Taking the article as a whole, as required by Pennsylvania law, (See MacRae v. Afro-American Co. 172 F. Supp. 184, 186, (E.D. Pa. 1959), it is clear that "Duffer's Dilemma" is capable of a defamatory meaning. Defendant seized upon Sellers as the vehicle and victim through which an ordinary incident in the life of the law was reported in a flip and grossly distorted fashion designed to entertain Time's readers at the expense of a man who had been innocently involved in a great personal tragedy.

A. "He Plays Golf For Business Rather Than Pleasure"

This statement is a misrepresentation of the facts. In his deposition in this case, William Sellers testified as follows:

I do not play golf for business rather than pleasure. I play golf because I like to play golf, and if it happens to be a business situation, that is completely secondary. (R. 62).

Further, reasonable men could find the statement defamatory for depicting Sellers as a materialistic, wheeler-dealer businessman who cannot forget business even for a few hours on the golf course. (R. 92). It also implies that he uses golf in order to solicit orders rather than using more forthright means, such as straightforward salesmanship, relying on the quality of his products, which is the actual case. (R 62-64).

B. "Sellers' Game Was Running True to Form"

This is a snide allusion from which reasonable men could conclude that Mr. Sellers always plays golf "awkwardly" or else that he always does business on the golf course - both of which reflect adversely upon him and tend to lower his reputation, both personal and business, in the community. It implies that there is continuity - a plan - to his actions which the article then goes on to depict as unsavory.

C. "At the Third Tee, His Mind on a Potential Deal, Sellers Hit the Ball So Awkwardly That It Flew To the Rear and Struck One of His Partners, James Walsh....As a Result, Walsh Was Blinded in His Left Eye."

Again, this assertion, like the story itself, must be taken in its entirety in order to appreciate its impact. A jury could reasonably conclude that these statements are defamatory because they state that Mr. Sellers, while playing a dangerous game, was so crass as to be thinking about an upcoming business "deal" (a word with negative connotations) instead of keeping his mind on the game; and that Mr. Sellers' willful behavior re-

sulted in his hitting the ball "awkwardly" and in blinding his golfing partner, the intended victim of his business machinations.

Time's account, with its attendant insinuation, is a far cry from fair or truthful reporting of what happened at the golf outing. Time made no effort to find out what Mr. Sellers' mind was on at the third tee. In fact, Mr. Sellers had stated in his deposition that it was on his game and not on any business deal. (R 67-71).

Nor is it fair or truthful to imply, as Time does, that the shot was "hit...awkwardly" as a result of Mr. Sellers' mind being on a "deal".

Further, it is the ultimate in unfairness and untruthfulness to assert that such a tragic result as the blinding of his golfing companion was the result of Mr. Sellers' not having his mind on the game, a premise which is untrue. The overall impression is that Mr. Sellers is the sort of person who would risk grave injury to others because of his preoccupation with his selfish desire for material gain. Again, this is simply not so - and Mr. Sellers should have the opportunity to permit a jury of his peers to determine whether he was defamed or damaged by a reckless invasion of privacy - and if so, what damages he sustained.

Tested by standards developed in prior Pennsylvania decisions, it becomes apparent that "Duffer's Dilemma" is capable of a defamatory meaning.

In Friday v. Official Detective Stories, Inc., 233 F. Supp. 1021 (E.D. Pa. 1964), defendant published an article containing the following statement: "A search of police records yielded the names of several associates, as well as all Friday's relatives who lived in West Texas. These

persons were warned to notify police if they received any communication from Friday and their homes were placed under surveillance." (Emphasis supplied) 233 F. Supp. 1022.

In the libel action brought by the Friday relatives, the District Court denied defendant's Motion for Summary Judgment saying:

> Whatever state law is applicable, the first question, whether the statement is defamatory, may not be disposed of without trial. I am not prepared to say as a matter of law on the present record that the words of the statement, taken in their usual and ordinary sense, could not reasonably bear the meaning ascribed to them by plaintiffs. There is nothing before me one way or the other on whether the term "police records" is a term of art.. Certainly it is not clear to me beyond all doubt that its ordinary meaning in the mind of the reading public excludes an inference of criminal involvement. 233 F. Supp. 1022.

Birl v. Philadelphia Electric Co., 402 Pa. 297 167 A. 2d 472 (1960) is also instructive on this point. Plaintiff sued defendant for slander for making the following statement: "Philadelphia Electric will have no further dealings with Joseph J. Birl and he will no longer be allowed to contact or do business in any way with any of the Philadelphia Electric Company properties, because when he was employed by Philadelphia Electric Company in 1951, Joseph J. Birl quit without giving notice." 402 Pa. 303-4, 167 A. 2d 476. Like the Court of Appeals here, the lower Court in Birl ruled that such a statement was incapable of a defamatory meaning and dismissed the Complaint. On appeal, the Supreme Court of Pennsylvania reversed, saying:

From that statement the recipients of such communication could reasonably conclude that Birl lacked honor and integrity and was not a person to be relied upon insofar as his business dealings were concerned. That such an attack on Birl's integrity and honor might deter third persons from "associating or dealing" with him is too obvious for words and the recipients of such a communication could reasonably have been deterred from any future association or dealing with Birl. 402 Pa. 304, 167 A. 2d 476.

The case of Boyer v. Pitt Publishing Company 324 Pa. 154 (1936), also details the various factors a court must consider when deciding the initial question of "capability". The alleged libel originated in a newspaper article published by defendant which described the trial of a State Senator and three other parties charged with vote fraud. The article, in relevant part, read as follows:

VOTE TRIAL EVIDENCE UPSET
U.S. PLEADS SURPRISE AS COYNE WITNESS
RETELLS STORY

Special Federal Prosecutor Louis E. Graham pleaded surprise today at the testimony of one of the principal government witnesses in the retrial of State Senator James J. Coyne and three others on vote fraud charged.

Graham contended that Robert K. Boyer (plaintiff), Mt. Lebanon Township Commissioner, had changed his testimony from that given at the first trial. 324 Pa. 156.

The Court noted that defendant's contention that the article was not incompatible with an honest as distinguished from a willful and distorted varia-

tion in the two versions, was without merit as a defense to an action for libel. In determing whether a publication is capable of a defamatory meaning, the Court must give the words the same signification that would be attributed to them by the average persons among whom the article was intended to circulate (324 Pa. 157), and in doing this the Court explained:

> In the present case it cannot be declared as a matter of law that a prominent headline on the front page of a newspaper, captioning an article dealing with a sensational trial of public interest and alleging that the "star witness" changed his testimony, was reasonably incapable of being construed by the general reader - considering the cynicism of human nature - as implying perjury rather than merely a lapse of memory. (Emphasis Added: 324 Pa. 157).

Analyzing the instant case in the light of these decisions, it can be seen that the Time article was at least capable of a defamatory meaning. To portray a man as a materialistic businessman who cares more about deals than his companion's personal safety is certainly to "harm the plaintiff's reputation by lowering him in the estimation of the community" and "deter third persons from associating or dealing with him." (See Birl v. Phila. Electric, MacRae v. Afro-American Corp., and Restatement, Torts, §559 (1938), supra.).

When a man is depicted as materialistically oriented, to the point of veritable disregard for the personal safety of others, "the cynicism of human nature," (See Boyer, v. Pitt. 324 Pa. 154 (1936), especially among Time readers, need not be overestimated in order to envision the damage to reputation that necessarily follows.

The Court of Appeals, however, failed even to discuss these and other Pennsylvania cases which support Petitioners' claim that the article is capable of a defamatory meaning. Rather, the Court attempted to circumvent the body of case law by holding that Petitioners were complaining about a "libel by innuendo", not "libel per se," and that either the language in the article did not give rise to "the innuendos" claimed, or that the innuendos were incapable of a defamatory meaning. The Court cited a sole Pennsylvania case, Sarkees v. Warner West Corp. 349 Pa. 365 37 A. 2d 544 (1944) as the authority for such a holding. In so doing, the Court again erred.

Petitioners have always asserted that the statements made were libelous per se and required no proof of special damages to make out a cause of action.

Secondly, no reasonable man could have found the statement complained of in Sarkees defamatory.

Thirdly, the "libel by innuendo" theory is an intellectual fossil. A case decided 16 years after Sarkees, Cosgrove Studio and Camera Shop, Inc. v. Pane, 408 Pa. 314, 182 A. 2d 751 (1962) severely limited the nebulous "innuendo" concept to a point where the concept of "libel by innuendo" means absolutely nothing. Reasonable men could either find defamatory meaning in a statement or they could not - the phrase "libel by innuendo" adds nothing to the inquiry.

IV. THE COURT OF APPEALS ERRED IN FAILING TO REMAND THE CASE TO THE LOWER COURT ON THE ISSUE OF INVASION OF PRIVACY

Petitioner's Complaint sets forth a cause of action for invasion of privacy, as well as defamation, yet the Courts below have failed to even

discuss this branch of the case. Petitioners maintain that it was error not to allow this issue to be passed upon by a jury.

The unwarranted invasion of the right to privacy is actionable in Pennsylvania. Bennett v. Norban, 396 Pa. 94, 151 A. 2d 476, (1959); Mack Appeal, 386 Pa. 251, 126 A. 2d 679 (1956) cert. denied 352 U.S. 1002 (1957), Aquino v. Bulletin Co. 190 Pa. Super. 528, 154 A. 2d 422, (1959).

Pennsylvania Courts have looked to the Restatement of Torts for a concise definition of the tort: "A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others, or his likeness exhibited to the public, is liable to the other." Restatement of of Torts, §867 (1938) cited in Mack Appeal, Supra, Bennett v. Norban, Supra, Forster v. Manchester, 410 Pa. 192, 196, 189 A. 2d 147, 149-150 (1963).

The right to privacy exists to protect a person's natural desire to remain obscure and alone. Pennsylvania courts have upheld a person's right to sue another who has trespassed on these personal sensibilities in order to redress the victim's sense of personal outrage at being revealed to public scrutiny. Bennett v. Norban, Supra.

However, the right to privacy does not usually extend to matters involving public figures, such as actors and public officials, or matters of legitimate public interest, provided that the report is basically factual and undistorted and is not written in such a manner as would offend a person of ordinary sensibilities. Aquino v. Bulletin Co., Supra; Jenkins v. Dell Publishing Co., 251 F. 2d 447 (3rd Cir. 1958), cert. denied 357 U.S. 921 (1958).

In the case of William Sellers, the court would not need to decide whether the summary judgment proceeding in the personal injury action was a matter of legitimate public interest, because it is clear that under Pennsylvania law, Time forfeited any conditional privilege to report on such events when it strayed from the facts and added embellishments drawn solely from its imagination to dress up an otherwise ordinary story. See Aquino v. Bulletin Co., Supra. Jenkins v. Dell, Supra, Varnish v. Best Medium Pub. Co., 405 F. 2d 608 (2d Cir. 1968), cert. denied 394 U.S. 987 (1968), rehearing denied, 395 U.S. 930 (1968). Leverton v. Curtis Publishing Co., 192 F. 2d 974 (3rd Cir. 1951).

In Aquino v. Bulletin Co., 190 Pa. Super. [redacted], 154 A. 2d 422 (1959), defendant published a story growing out of a divorce action which had not previously attracted public attention. The wife and her parents, who were mentioned in the story, sued for invasion of privacy. The jury returned a verdict in favor of the parents and denied recovery to the wife. The wife did not appeal this decision.

On appeal by the defendant, the Pennsylvania Superior Court affirmed judgement for the parents. The Court noted that the marriage and divorce were newsworthy events and that defendant might have even been justified in quoting from the opinion of the judge in the divorce action. However, once the defendant strays from a straightforward statement of a newsworthy event, and adds color to the story drawn only from the author's imagination, it becomes a jury question whether or not the article is an invasion of privacy. See also, Varnish v. Best Medium Pub. Co., Supra.

Thus, Sellers was clearly entitled to have a jury pass on his invasion of privacy claim. As stated previously, Time had no way of knowing

what Sellers had on his mind before hitting his tee-shot, yet it glibly stated that his mind was on a business deal; Time made up the non-"fact" that Sellers played golf for business rather than pleasure and that his game was running "true to form." By calculatedly holding Sellers up to the public for its amusement, Time invaded Sellers' right to privacy. By embellishing on the opinion of the court in the personal injury proceedings, Time forfeited any privilege it might have had to report on the decision. On these facts, Pennsylvania law requires that Sellers be allowed to have a jury weigh his invasion of privacy claim.

V. THE ARTICLE IS NOT PRIVILEGED UNDER THE RULE OF NEW YORK TIMES V. SULLIVAN

As stated previously, the District Court held that plaintiff could not recover because the article in question was privileged under common law rules and under the constitutional privilege first enunciated in New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Considering that William Sellers was not a public figure and that how he played golf was not an issue of any public moment, the effect of the lower court's unwarranted extension of the Sullivan rule was to hold, that any matter which Time thinks worthy of printing clothes it automatically with the First Amendment privilege. Such a rule has dangerous public policy implications. It effectively wipes warranted defamation actions off the books and frees the media from any risk of suit that would otherwise hold them to a strict standard of accountability for misleading and unfair journalistic practices. Petitioners respectfully direct the Court's attention to the fact that Judge Kraft's application of the Sullivan privilege to this case has come under scholarly criticism as an unwarranted extension of the constitutional privilege. See, Note, 43 Temple L.Q. 250 (1970).

The Court of Appeals evaded the important issues of privilege by holding that the article was incapable of a defamatory meaning.

Petitioners maintain that the constitutional privilege of New York Times v. Sullivan does not extend to the article in this case. Sullivan and its progeny afforded a protective mantle to comments on public officials or public figures involved in issues in which the public has a justified and important interest. See, e.g., New York Times Co. v. Sullivan, (alleged defamation concerning the official conduct of a law enforcement officer); Garrison v. Louisiana, 379 U.S. 64 (1964) (restricting the use of criminal libel prosecution for comments on the official conduct of public officials); Rosenblatt v. Baer, 383 U.S. 75 (1966), (alleged defamation arising out of public debate on issues relating to a governmental issue or plaintiff's governmental capacity); Curtis Publishing Co. v. Butts, Associated Press v. Walker, 388 U.S. 130 (1967), (Suit for defamation by a widely known public fugure who was also involved in issues in which the public had a justified and important interest); Greenbelt Cooperative Publishing Assoc. Inc. v. Bresler -U.S.-, 38 USLW 4390 (1970) (suit for defamation by prominent real estate developer in community who was embroiled in public controversy.)[1]

An analysis of the facts in these cases quickly

[1] The article in Bresler gave an accurate and full report of public debates on issue of burning community importance. The Court recognized that if the reports had not been accurate and full, the result may have been different. -US-, 38 USLW 4392. By contrast, "Duffer's Dilemma" cannot claim to be either an accurate or full report of the opinion in the personal injury case, an event itself that had not previously attracted or deserved public attention.

reveals that the Court never intended the constitutional privilege to cover the situation presented in this case.

Quite obviously, there can be no claim that Sellers was a public official or that the article related to the official conduct of a public official.

Nor is there any merit to the assertion that Sellers was a public figure in the sense that term was used by this Court in Butts, Walker or Bresler. As the Court clearly stated in the Butts and Walker opinions, in order to be a "public figure", an individual must either have deliberately thrust himself into the public eye, as had General Walker or Mr. Bresler, or achieved public recognition independent of the publicity in question, as had Butts as the prominent footbal coach of a nationally known and ranked college team.

All of the lower court decisions following in the wake of Butts and Walker have limited the application of the "public figure" privilege to those situations where plaintiff has voluntarily entered the public realm in a recognizable manner. See, e.g. Pauling v. Globe-Democrat Publishing Co., 362 F. 2d 188 (8th Cir. 1966), scientist actively engaged in political-scientific causes; Cepeda v. Cowles Magazines and Broadcasting, Inc., 328 F. 2d 869 (9th Cir. 1966) cert. denied, 379 U.S. 844 (1964), well-known sports figure; United Med. Labs., Inc. v. Columbia Broadcasting System, Inc., 404 F. 2d 706 (9th Cir. 1968) cert. denied, 394 U.S. 921 (1969); Arizona Biochem. Co. v. The Hearst Corp., 302 F. Supp. 412 (S.D.N.Y. 1969); All Diet Food Distrib., Inc. v. Time, Inc., 56 Misc. 2d 821, 290 N.Y.S. 2d 445 (1968); those who offer products for general use and consumption to the public.

By contrast, the privilege has not been applied where the comment relates to the activities of a man who has not sought the public's attention. In Afro-American Publishing Co. v. Jaffe, 366 F. 2d. 649 (D.D.C. 1966), a neighborhood pharmacist had notified defendant that he no longer wished to sell defendant's newspaper because he believed it fostered racial hatred or distrust. Plaintiff made no attempt to publicize his views, but defendant responded by publishing an article accusing plaintiff of being a "bigot". The Court rejected defendant's plea of privilege, holding that the privilege did not extend to non-public persons who had not voluntarily called public attention to themselves.

Based on the holdings of Butts and subsequent cases, it becomes apparent that William Sellers, an unassuming, local businessman from Rosemont, Pennsylvania, is not a "public figure." Until Time used him as a vehicle for its attempt at a colorful story, he was unknown to the public, and, like Mr. Jaffe, he never sought public attention. Surely, the constitutional privilege first enunciated in Sullivan should not be applied in this case.

Additionally, William Sellers was not involved in an issue in which the public had a justified and important interest, i.e. a public issue as used in Mr. Justin Harlan's opinion in Butts.

The golf game and accident were not the kind of public issues even intended to be constitutionally protected from the "chilling effect" on First Amendment rights encompassed in the Sullivan rule. The negligence action summary judgment decision was an inconspicuous event until Time seized upon it and gave it publicity by the addition of unwarranted and untrue "color". Finally,

assuming arguendo that the Court ruling refusing to invoke assumption of risk to support summary judgment for Sellers in the personal injury action was a public issue and that it was worthy of constitutional protection, the article libelled him in areas in which the public had no legitimate concern - i.e. Sellers' personal character as described by the "color added", which had no relationship to the judicial decision.

The golfing accident, and the subsequent tort litigation simply does not rise to that level of public interest to justify application of the constitutional privilege. The Third Circuit in a recent decision, Rosenbloom v. Metromedia, 415 F. 2d 892 (3rd Cir. 1969) recognized that comments on matters of overriding public interest, such as allegedly obscene materials, may come within the protective scope of the Sullivan privilege doctrine. However, it would be absurd to maintain that the public had an overriding, legitimate interest in Mr. Sellers' accident, or the outcome of an ordinary summary judgment proceeding in the subsequent negligence action to support the invocation of the constitutional privilege.

As to the right to privacy claims, the article is not entitled to the privilege created in Time, Inc. v. Hill, 385 U.S. 374 (1967). In Hill, the Court recognized that an article about the opening of a new play which proved to be a smash hit running on Broadway and throughout the nation for several years, with tens of thousands in attendance, which play was based on an actual incident receiving national publicity, was a matter of public interest. The life of William Sellers, however, does not reach the same level of public interest and does not require application of the

Hill standard.[1]

VI. THE ARTICLE IS NOT ENTITLED TO ANY COMMON LAW PRIVILEGE

Statements made in "Duffers Dilemma" cannot be privileged either as a fair comment on matters of public concern and interest, or as a report of a judicial proceeding.

Under Pennsylvania law, a matter is only of public concern if it concerns: a public official. Mulderig v. Wilkes-Barre Times, 215 Pa. 470 (1906); comment on candidate for public office; MacAndrew v. Scranton Republic Publishing Co., 364 Pa. 594, 72 A. 2d 780 (1950); comment about municipal affairs; Morgan v. Bulletin Co., 369 Pa. 349, 85 A. 2d 869 (1952); comment about a newspaper columnist; O'Donnell v. Philadelphia Record Co., 356 Pa. 307, 51 A. 2d 775 (1947), cert. denied, 332 U.S. 766 (1947).

Secondly, the comment must be based on facts truly stated, which simply is not the case here.

Nor is the article entitled to the judicial proceeding privilege which is limited to a full and correct report of judicial proceedings without prejudiced comment. Boyer v. Pitt Publishing Co. 324 Pa. 154, 188 At. 203 (1936). Where, as here, the defendant's account is not accurate or complete, or at least a fair abridgment of the proceedings, the privilege is lost. Purcell v. Westinghouse Broadcasting Co., 411 Pa. 167, 177, 191

[1] Hill, of course, has no bearing on the issue of privilege as to the libel claims, because the Court specifically noted that its decision was limited to privacy actions and that the decision might well have been different had the case been a libel action.

A. 2d 662, 667 (1963).

Finally, even if the rule of Times v. Sullivan is applicable, Petitioners assert that a jury must pass on the issues of good faith and malice. See St. Amant v. Thompson, 390 U.S. 727 (1968); Varnish v. Best Medium Pub. Co., 405 F. 2d 608 (2d Cir. 1968) cert. denied 394 U.S. 987 (1969), rehearing denied 395 U.S. 930 (1969). Where, as here, there is evidence that defendant made up facts out of whole cloth which portray plaintiff in an unfair light, which have no basis in fact and which were not properly checked and investigated, plaintiff is entitled to have his case go to the jury on the issue of actual malice. Pape v. Time, Inc., 354 F. 2d 558 (7th Cir. 1965).

CONCLUSION.

WHEREFORE, for the reasons stated in this Petition, a Writ of Certiorari should issue to review the Judgment and Opinion of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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Attorneys for Petitioners

APPENDIX 1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM W. SELLERS : CIVIL ACTION
THE SELLERS COMPANY, INC. :
and SELLERS SERVICE, INC. :

VS. :

TIME, INC. : NO. 40373

OPINION

KRAFT, J. May 12th, 1969

This is defendant's motion to dismiss and for summary judgment in this action for damages arising out of an alleged libel which appeared in an article published in "The Law" section of defendant's magazine on May 6, 1966. The article reads as follows:

"NEGLIGENCE"

'Duffer's Dilemma

'William Sellers runs a heating-equipment company near Philadelphia, and he plays golf for business rather than pleasure. One June day in 1964, Sellers' game was running true to form at the Manufacturers Golf and Country Club in Oreland, Pa. At the third tee, his mind on a potential deal, Sellers hit the ball so awkwardly that it flew to the rear and struck one of his partners, James Walsh, sales manager of the tank division of Bethlehem Steel in Dunellen, N.J. As a result, Walsh was blinded in his left eye.

APPENDIX 2

'Since Sellers was working while golfing, Walsh sued both him and his company for $250,000 claiming that Sellers had negligently failed to wipe his hands before swinging, causing the club to slip. In answer, Sellers moved to have the suit dismissed on a seemingly unassailable ground: anyone who ventures on a golf course 'assumes the risk of being struck by a ball' and is thus barred from seeking damages.

'To everyone's surprise, Sellers' motion was shot down by Judge Alfred Luongo of the Philadelphia U.S. District Court, which had jurisdiction because Sellers and Walsh live in different states. Judge Luongo readily agreed that every golfer 'assumes the risk or is guilty of contributory negligence if he intentionally or carelessly walks ahead or stands within the orbit of the shot of a person playing behind him.' But when the ball struck Walsh, said the judge, he was sitting in a golf cart 20 ft. to Sellers' rear - a place of supposedly perfect safety. As a result Walsh cannot be said to have 'voluntarily assumed the risk' of being partly blinded. Ruled the judge: Duffer-Defendant Sellers must stand trial." (The above underlined excerpts represent the alleged defamatory portions of the Article)

In their complaint, plaintiffs, in part, allege that the article" ** is replete with statements that are false, misleading, or flip, which defame Plaintiff by holding him up to public ridicule as a stupid, awkward and incompetent person and portrays him as a crass, materialistic, selfish and thoughtless businessman, interested in nothing in life but business.***"

Additionally, plaintiff and his corporations

complain that the article defames their position in business and has subjected them to public disgrace by portraying plaintiff "** as one who has leaded solely on personal and social friendships and relationships as a means of advancing his own business interests and career to the exclusion of all other factors."

Apart from defendant's contention that the article is not libelous, Time argues that: "*** even assuming, contrary to fact, that the article were susceptible of a defamatory meaning, it is privileged under the common law rule of a fair report of judicial proceedings ***"[1] and under the constitutional privilege[2] accorded to publications touching upon public issues or matters of public concern which has developed since its promulgation in New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Time Inc. v. Hill 385 U.S. 374 (1967); Curtis Publishing Co. v. Butts and Associated Press v. Walker, (together) 388 U.S. 130 (1967); United Medical Laboratories, Inc. v. Columbia Broadcasting Systems, Inc., 404 F. 2d 706 (9 Cir. 1968); cert. denied __U.S.__ (March 24, 1969); Bon Air Hotel, Inc. v. Time, __F. Supp.__ (S.D. Ga. 1969).

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[1] Defendant's pre-trial memorandum page 2.

[2] In order to overcome this privilege plaintiff must prove with "convincing clarity" that the statement was false and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

APPENDIX 4

Plaintiff's do not dispute the public interest in the decision of this Court in Walsh v. Sellers.[3] However, they claim that the aforesaid privileges were lost because of the improper way in which Time unfairly and inaccurately portrays plaintiff in a "slanted", "smart alecky" and "flippant" manner with a reckless disregard of the actual facts caused by defendant's failure to properly check out the story.

After argument and careful consideration of the motion, with its attached materials, the article and the pertinent law, it is the opinion of the Court that the article comes within the common law and constitutional privileges previously set forth.

We disagree with the plaintiff's contention that the article loses its privilege by reason of the alleged "flippant" and "smart alecky" style of writing which was utilized by Time to create reader interest. Even such a respected periodical as United States Law Week, sometimes adds "color" to enliven an otherwise routine and dull account of a legal decision.[4]

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[3] The decision C.A. 37838, was summarized and reprinted in the April 19, 1966 issued of United States Law Week. This article came to the attention of the editor of the Law Section of Time.

[4] Compare the following article reported in the April 15, 1969 issue of Law Week:

(Continued)

APPENDIX 5

4 Continued

"Grandpa Must Pay Tax Bill
On Grandson's Horse Hobby

A kindly old grandfather who sold his 10-year-old grandson a horsie, or at least a piece of one, is slapped by the U.S. Court of Appeals for the Sixth Circuit with a $37,000 tax bill on the horsie's winnings at grown-up places like Arlington Park. (Greer v. U.S., 3/21/69).

The grandfather insisted that only after the 10-year-old called him and asked to buy a 'racing interest' in the horse-Ridan-did he sell a one-fifth piece of the action to both the boy and his five-year-old brother for $550 each. The precocious tykes may have had one eye on the racing form, since on the day of the transfer the horse was the odds-on-favorite to win a $127,000 race three days later. He won it, and kept on winning for two more years, and the court just can't quite call the whole affair an arms'-length deal.

The grandfather didn't really make a bona fide sale of income-producing property in the court's opinion, because the consideration was inadequate. The $550 may have represented one-fifteenth of the horse's depreciated book value, says the court, but he had already won his first four races and was insured for $100,000.

The taxpayer doesn't fare any better in trying to convince the court to allow capital gains treatment for insurance proceeds on a foal that only lived five days. The foal was carried by its dam for 11 months, the court observes, but it wasn't held by the owner for more than six months within the meaning of the statutory requirement. 'It is not enough to conjure up a hypothetical course of dealing in unborn foals' to satisfy

4 Continued

> the standard. Besides, the court adds, reductio ad absurdum is clearly applicable: suppose the mare miscarried seven months after conception, but four months before birth. A fetus may be aborted, but it isn't depreciated in the eyes of the court, even if it was an en ventre sa mere for over six months (Page 2575) (emphasis ours).

The Time article, read as a whole, fairly reports the result of Judge Luongo's decision. Plaintiff argues that Time failure to explain to its readers the legal effect of a motion for summary judgment, whereby the facts must be construed in the light most favorable to the party opposing the motion, gave the readers of the article the false impression that Sellers did not dispute the claim that he did hit the ball to the rear, when that allegation was, in fact, a contested issue.

We think this objection is not well taken. It was Sellers himself, by his motion for summary judgment under Rule 56, who asserted that there was no genuine issue as to any material fact, and who thereby admitted, for the purpose of that motion, that he did hit the ball to the rear, but claimed that the plaintiff was barred from recovery by the legal defense of assumption of risk.

In the posture of the legal proceedings in Walsh v. Sellers at the time of the motion for summary judgment, this allegation became an admitted fact and Time was entitled so to report it.

The two outstanding points of reader interest in the article are the unusual flight of the ball and the legal decision that the defense of assump-

tion of risk was inapplicable under the particular facts. We think this decision qualifies as a matter of public interest and comes within the New York Times rule requiring the plaintiff to prove "actual malice" on the part of the defendant.

The supporting affidavits attached to the motion together with the depositions and answers to interrogatories, manifestly demonstrate the complete lack of any knowledge of the falsity of the article or reckless disregard of the truth on the part of Time's employees. The plaintiff has submitted no affidavits to the contrary and, so, has failed to offer evidence of the existence of any genuine issue of actual malice.

We find that the portions of the article heretofore underlined are substantially accurate, and, while in a flipant style are unlikely to have effect on any average reader's impression of the plaintiff's character.

Plaintiff has admitted in his deposition that he plays golf occasionally and shoots in the 100 to 105 range, which reasonably puts him in a "duffer". category. The term "duffer" was a fair comment and imports no defamatory meaning. Plaintiff further admitted that he was on a business outing, and that his intent in playing golf that day was to further the profits of the Seller's Company, Inc.

Additionally, plaintiff imputes a defamatory meaning to statements in the article which allegedly infer that plaintiff was "crass", "thoughtless", "stupid" and thereby "wilfully" struck his partner with the errant shot.

We are not persuaded that such a tortured construction of the fair and accepted meaning of

the statements[5] can be squared with ordinary common sense. Such language could only offend a person of the most highly developed sensibilities. The fact that Time could not know what was on Sellers' mind when he hit the shot does not render Time's conclusion defamatory.[6] "*** Such a statement is merely an expression of the opinion of him who makes it. Its truth or falsity is probably not even susceptible of proof."[7]

In the present sophisticated age of business, the ordinary reader of Time would not impute a defamatory meaning to a statement that a businessman was playing golf for business rather than pleasure. It would strain our credulity to believe that the average reader of defendant's magazine would infer that plaintiff "willfully" caused the ball to take its erratic flight to the rear to injure his partner, who, he hoped, would be favorably disposed to recommend his products. At most, the article portrayed the plaintiff as being the perpetrator of a single careless act, which is not actionable. Flores v. Mosler Safe Co., 7 App. Div. 2d 226, 182 N.Y.S. 2d 126 (3d Dept.) aff'd. 7 N.Y. 2d 276, 164 N.E. 2d 853 (1959).

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5 "At the Third Tee, his mind on a potential deal, Sellers hit the ball so awkwardly that it flew to the rear and struck one of his partners, James Walsh...As a result, Walsh was blinded in his left eye.

6 "'Errors of fact, particularly in regard to a man's mental states and processes are inevitable...'" New York Times Co. v. Sullivan, supra at p. 272.

7 Crosby v. Rockland County Citizen Publishing Co. 232 N.Y.S. 2d 819, aff'd. 20 App. Div. 2d 561, 246 N.Y.S. 2d 59 (2d Dept. 1963).

APPENDIX 9

Accordingly, we conclude that defendants' motion should be granted. However, because there are serious constitutional questions involved in this case which should be reviewed by the Court of Appeals in the interest of improving the administration of justice, we will direct that plaintiff's complaint also be dismissed, so that our order will be a final judgment and therefore subject to appeal. Poss v. Lieberman, 299 F. 2d 358, 359 (2 Cir. 1962) cert. denied 370 U.S. 944 (1962).

ORDER

NOW, this 12th day of May, 1969, IT IS ORDERED that the defendant's motion for summary judgment be, and it is, granted and the plaintiff's complaint is hereby dismissed.

/s/ C. William Kraft
Judge

APPENDIX 10

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 17917

WILLIAM W. SELLERS, THE SELLERS COMPANY, INC., AND SELLERS SERVICE, INC.

Appellants,

v.

TIME, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued January 22, 1970

Before FORMAN, SEITZ and ADAMS, *Circuit Judges.*

OPINION OF THE COURT

(Filed March 20, 1970)

SEITZ, *Circuit Judge.*

This is a diversity action for libel based on Pennsylvania law. William Sellers appeals from an order of the district court granting summary judgment to defendant Time, Inc. and dismissing his complaint. Sellers brought this action alleging Time injured his reputation and those of his companies with an article appearing in TIME magazine.[1] At the time the article was published, Sellers was president and majority shareholder of Sellers Service, Inc. and The Sellers Company, Inc.

1 "Duffer's Dilemma", The Law, TIME, May 6, 1966 at page 74.

The allegedly offending article reported a decision in a negligence action in which Sellers was defending against a claim that he had negligently caused the loss of a companion's eye during a business-golf outing. It dealt with Sellers' unsuccessful motion for summary judgment which was grounded on the theory that the companion had assumed the risk of the accident.

Time personnel first learned of the decision from a report in 34 Law Week 2563. A Time stringer [2] in Philadelphia was detailed to investigate and forward a copy of the opinion to New York. Because of the unusual factual setting, Time considered the opinion newsworthy and assigned a writer and researcher to the article. They subsequently obtained further reports from the stringer in Philadelphia. The article was prepared in draft, circulated and rewritten several times, and checked for accuracy by the researcher. It was ultimately submitted to Time's top-level editors and to legal counsel all of whom approved it for publication. It appeared under the heading "Negligence" in The Law section and read as follows:

"Duffer's Dilemma

"William Sellers runs a heating-equipment company near Philadelphia, and he plays golf for business rather than pleasure. One June day in 1964, Sellers' game was running true to form at the Manufacturers Golf and Country Club in Oreland, Pa. At the third tee, his mind on a potential deal, Sellers hit the ball so awkwardly that it flew to the rear and struck one of his partners, James Walsh, sales manager of the tank division of Bethlehem Steel in Dunellen, N. J. As a result, Walsh was blinded in his left eye.

"Since Sellers was working while golfing, Walsh sued both him and his company for $250,000, claiming that Sellers had negligently failed to wipe his hands

2 The stringer was a full-time newspaperman who worked part-time for Time as a reporter on assignments in the Philadelphia area.

before swinging, causing the club to slip. In answer, Sellers moved to have the suit dismissed on a seemingly unassailable ground: anyone who ventures on a golf course 'assumes the risk of being struck by a ball' and is thus barred from seeking damages.

"To everyone's surprise, Sellers' motion was shot down by Judge Alfred Luongo of the Philadelphia U. S. District Court, which had jurisdiction because Sellers and Walsh live in different states. Judge Luongo readily agreed that every golfer 'assumes the risk or is guilty of contributory negligence if he intentionally or carelessly walks ahead or stands within the orbit of the shot of a person playing behind him.' But when the ball struck Walsh, said the judge, he was sitting in a golf cart 20 ft. to Sellers' rear—a place of supposedly perfect safety. As a result, Walsh cannot be said to have 'voluntarily assumed the risk' of being partly blinded. Ruled the judge: Duffer-Defendant Sellers must stand trial."

In his complaint Sellers alleged that the article is replete with false, misleading, and flip statements which defame him and harm him and his corporations by diminishing their abilities to earn money. Time answered denying some portions of the complaint and pleading affirmative defenses. After discovery was completed, Time moved for summary judgment with supporting affidavits. The district judge granted the motion and dismissed the complaint.[3] He invoked three grounds for his decision. First he held that the article, "while in a flippant style, was unlikely to have effect on any average reader's impression of the plaintiff's character." Second he held that the article was privileged under the law of Pennsylvania. Last he held the article was privileged under the first amendment as interpreted in New York Times Co. v. Sullivan, 376 U. S.

3 Sellers v. Time Inc., 299 F. Supp. 582 (E.D. Pa. 1969).

254 (1964). Because a ruling on the privilege issues would only be necessary if the district judge erred in holding the article not capable of defamatory meaning, we shall consider Sellers' challenge to this holding first.

Sellers contends the district judge committed two errors in holding as he did on defamation. First he argues that the judge invaded the province of the jury by deciding the article was not defamatory whereas his proper function under Pennsylvania law was to determine whether the article was capable of a defamatory meaning. Sellers' statement of the law is accurate. See, e.g., Birl v. Philadelphia Electric Co., 402 Pa. 297, 167 A.2d 472 (1960); Boyer v. Pitt Pub. Co., 324 Pa. 154, 188 A. 703 (1936); Restatement Torts § 614 (1938). It is clear from the district court's opinion, however, that the court ruled that the article was not capable of a defamatory meaning.

Seller's second contention is that the article is capable of a defamatory meaning under Pennsylvania law and, thus, it was error to summarily dismiss his complaint. In support of his contention, Sellers offers several innuendos explaining the defamatory meaning he ascribes to the article. His primary contention, as stated in his brief, is that the article gives the overall impression that he "is the sort of person who would risk grave injury to others because of his preoccupation with his selfish desire for material gain." As evidence that this impression results from a reading of the article, he cites several sentences and explains how they contributed to this overall impression. In judging the validity of Sellers' argument, we are, of course, not concerned with the accuracy of the TIME article but only with the likely impact on the average TIME reader.

Under Pennsylvania law innuendos may be used to explain in what manner the article is defamatory. The innuendos, however, must be "warranted, justified and supported by the publication." Moreover, they "cannot be used to introduce new matter, or to enlarge the natural

meaning of the words, and thereby give to the language a construction which it will not bear." Lastly, it is our duty, as it was the lower court's, "to determine whether the language used in the objectionable article could fairly and reasonably be construed to have the meaning imputed in the innuendo[s]." Sarkees v. Warner-West Corporation, 349 Pa. 365, 36—, 37 A.2d 544, 546 (1944).

Turning now to Sellers' specific contentions, there are three sections of the article he points to in support of his thesis. He complains the statement "He plays golf for business rather than pleasure." depicts him as a "crass, materialistic, wheeler-dealer businessman who cannot forget business for even a few hours on the golf course." He further complains that the sentence implies he uses golf rather than "more forthright" means of obtaining business.

Sellers presumably intends these innuendos to support his contention that the article as a whole portrays him as one for whom business success overrides all concerns for others. Yet the statement is limited to one activity—golf. There is no indication of how frequently he plays. Moreover, as the district judge properly noted, business golf is neither shocking nor shameful to the average reader of TIME. Indeed, it is a commonplace practice among professional men and politicians, as well as businessmen. For these reasons, we conclude that a Pennsylvania court would reject these innuendos according to the teaching of *Sarkees v. Warner-West.*

Sellers also complains that the statement, "Sellers' game was running true to form," implies either that he always plays golf awkwardly, that he always carries on business when on the golf course, or that the resultant accident was predictable from his customary course of conduct. As to the first two alternatives, we do not believe they ascribe a defamatory meaning to the statement. The last alternative is equally unhelpful because it suggests that TIME's readers could believe that an impossible shot

to the rear was predictable. Such a belief would be so unreasonable that we do not believe it would be a possible inference for the reader to draw. These innuendos are equally unacceptable under the *Sarkees* rules.

Sellers' primary complaint centers on the following excerpt from the article:

> "At the third tee, *his mind on a potential deal,* Sellers hit the ball so awkwardly that it flew to the rear and struck one of his partners, James Walsh . . . As a result, Walsh was blinded in his left eye." (emphasis added)

Sellers claims that these statements in effect say that had he been concentrating properly the accident would not have occurred. The district court concluded that such an accusation would not amount to defamation because it is not actionable to portray a man as the perpetrator of a single careless act.[4] We do not believe it is necessary to go so far, especially in the absence of any Pennsylvania case adopting such a rule.

As was noted previously, we do not think the first two excerpts considered support Sellers' claim that his portrayal in the article would cause the reader to believe him to be an overly materialistic or a crass man. Nor do we find that they contribute to the capacity for defamatory meaning of the excerpt last quoted.

Under Pennsylvania law a key factor is the nature of the audience reached by the publication. Because of the posture of this case, the record does not contain any evidence of what TIME's readership was. Sellers asserts in his brief, however, that the "average reader of Time Magazine is far more sophisticated and intelligent than 'any average reader'." Sellers contends that the high level of sophistication of the readership increases the article's capacity for defamatory meaning. Since Time does not

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4 *Id.*, at 586.

contest this definition of its readership, we will accept it for the purpose of defining the average TIME reader. Our inquiry now must focus on the impact of the publication on the average reader of TIME. Boyer v. Pitt Pub. Co., 324 Pa. 154, 188 A. 203 (1936).

The article states that Sellers hit an awkward shot because he had his mind on a potential deal. In our view TIME's readership would not think less of Sellers because of such a portrayal. We say this because we believe TIME's readers are probably conversant enough with golf and/or golf stories to recognize the commonplace nature of such events. Moreover, as the district judge noted, playing golf for business rather than pleasure is also commonplace enough not to offend the average TIME reader's sense of propriety.

The ultimate question is whether the tragic result of these commonplace events imports a defamatory capacity to the otherwise legally unobjectionable article. We believe that the average TIME reader would recognize that the author of the "impossible" shot could not have foreseen its occurrence or consequences. We believe it likely that the fortuity of the events would be more likely to give rise to sympathy rather than disgust in the average TIME reader. Moreover, the flippant style of the article would, in our view, dilute the impact of the tragic shot in the minds of the readers. While the article may have caused Sellers great personal annoyance, annoyance alone does not constitute defamation. Scott-Taylor, Inc. v. Stokes, 425 Pa. 426, 229 A.2d 733 (1967).

In light of our disposition of the issue of the article's capacity for defamatory meaning, it is not necessary for us to reach the issues of privilege. For the same reason Sellers' claims relating to the scope of discovery need not be considered.

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX 18

UNITED STATES COURT OF APPEALS
for the Third Circuit

No. 17, 917

WILLIAM W. SELLERS, THE SELLERS COMPANY, INC.
and SELLERS SERVICE, INC.

Appellants,

vs.

TIME, INC.

(D.C. Civil Action No. 40373)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: FORMAN, SEITZ and ADAMS, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed May 12, 1969, be, and the same is hereby affirmed, with costs taxes in favor of appellee.

ATTEST:

/s/ Thomas F. Quinn
Clerk

APPENDIX 19

UNITED STATES COURT OF APPEALS
for the Third Circuit

No. 17,917

WILLIAM W. SELLERS, THE SELLERS COMPANY, INC.
and SELLERS SERVICE, INC.
Appellants,

vs.

TIME, INC.

SUR PETITION FOR REHEARING

Present: HASTIE, Chief Judge, FORMAN, FREEDMAN, SEITZ, VAN DUSEN, ALDISERT, ADAMS and GIBBONS, Circuit Judges.

The petition for rehearing filed by

appellants

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Collins J. Seitz
Judge

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IN THE

Supreme Court of the United States

October Term, 1970.

No. 437.

WILLIAM W. SELLERS, THE SELLERS COMPANY, INC. and SELLERS SERVICE, INC.,

Petitioners,

v.

TIME, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 437.

WILLIAM W. SELLERS, THE SELLERS COMPANY, INC. AND SELLERS SERVICE, INC.,

Petitioners,

v.

TIME, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

OPINIONS BELOW.

Petitioners seek a writ of certiorari to the United States Court of Appeals for the Third Circuit which on March 20, 1970 affirmed the judgment of the United States District Court for the Eastern District of Pennsylvania dismissing the complaint in a libel action based on an article published in Time magazine. The Third Circuit,

agreeing with the District Court, held that the Time article was not capable of a libelous meaning under the Pennsylvania common law of libel.' The Third Circuit's opinion (Appendix 10 of Petition) is reported at 423 F. 2d 887.

The District Court additionally granted respondent's motion for summary judgment on the grounds that the Time article was privileged as a fair report of judicial proceedings under the Pennsylvania common law of libel and was also constitutionally privileged as a matter of law under the principles of *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964). The Court of Appeals did not reach these privilege questions.

The District Court's opinion (Appendix 1 of Petition) is reported at 299 F. Supp. 582.

QUESTIONS PRESENTED.

1. Whether the Third Circuit correctly held that the Time article was not reasonably capable of a defamatory meaning, in accordance with established principles of the Pennsylvania common law of libel.

2. If not, whether the District Court correctly held that the Time article was privileged as a fair report of judicial proceedings under the Pennsylvania common law of libel, and was constitutionally privileged under *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964) and related decisions of this Court.

STATEMENT OF THE CASE.

This is a libel action[1] based on an article entitled "Duffer's Dilemma" which appeared in the Law section of the May 6, 1966 issue of Time magazine. The article reported on a personal injury action instituted in the District Court for the Eastern District of Pennsylvania against William Sellers and the Sellers Companies by a business acquaintance, James Walsh, whom Sellers had blinded in a freak golfing accident. The development in the case that prompted Time's report was District Judge Luongo's denial of Sellers' motion for summary judgment in which plaintiffs asserted that Walsh had assumed the risk of Sellers' "impossible" shot which had been hit laterally and to the rear of the tee.

The decision that the defense of assumption of risk was inapplicable because Walsh was hit by a wild shot while in a place of supposedly perfect safety was reported and summarized in Sections 1 and 2 of the April 19, 1966 issue of United States Law Week, 34 U. S. L. W. 1160, 2563, where it was seen by the editor of the Law section of Time magazine (App. 123-24).[2] Time's Philadelphia correspond-

1. The petition erroneously describes the action as being for libel and invasion of privacy (e.g., p. 3). The complaint sounds solely in libel; it contains no language which even remotely suggests a privacy cause of action. Petitioners have proceeded exclusively on a libel theory, both opinions below describing and treating the action as for libel only. Individual petitioner Sellers first contended "that his cause of action may also be sustained under the Pennsylvania common law principle of invasion of privacy" in a petition for rehearing by the Third Circuit, filed April 3, 1970. The petition for rehearing complained that the Court of Appeals "completely overlooked and failed even to discuss the invasion of privacy issue as it it did not exist," based on an oblique reference to common law invasion of privacy in a footnote in petitioners' reply brief.

2. References to the Appendix containing the designated portions of the record on appeal in the Third Circuit are cited herein as "App.".

ent reviewed the District Court file in *Walsh v. Sellers*, and forwarded a copy of Judge Luongo's opinion to New York with a memorandum summarizing the depositions of Walsh and Sellers in that action (App. 18). The Time article was based on Judge Luongo's opinion and the sworn deposition testimony of Sellers, taken in the Walsh action. The article was prepared in draft (App. 46), and then edited, reviewed by Time's Managing Editor, checked for accuracy by a researcher and reviewed by a Professor of Law at Columbia University prior to publication (App. 13).

Sellers testified in his deposition in *Walsh v. Sellers* that on the day of the accident he was at a golf dinner and outing of the Oil Trade Association of Philadelphia, and was there on the business of Sellers Company to solicit sales and make arrangements for the purchase or sale of products used by his company. His admitted intent in playing golf that day was to further the profits of Sellers Company. He also stated that Walsh was "in a position to help me as well in recommending our products" (App. 2-3). He further testified that he did not have a playing membership at any club, and that he played golf "maybe two, maybe three, five, maybe half a dozen times a year" at the various outings he went to (App. 5). As to his golf prowess, Sellers stated that he would generally expect "to go out and shoot 100-105, something like that" (*Ibid.*). With respect to the accident, Sellers admitted he was unable to remember exactly what happened, but thought that in swinging, the toe of his club connected with the ball and instead of going forward, it had a spin on it which made it curve backwards and to the side. He did not deny that the ball struck Walsh in the eye (App. 6-7).

Time's article, which reported a judicial decision that held the defense of assumption of risk inapplicable in a personal injury action arising out of a wild golf drive

described by the Court as an "impossible" shot, clearly dealt with a matter of public interest. The article, which is short, is set out in full in the opinions below. Although written in a lively prose style, which petitioners characterized as "flippant" and "smart alecky", it is obviously not defamatory.

Nonetheless petitioners filed a libel action on May 26, 1966 claiming that the article was false and defamatory. Sellers contended the article libeled him because (1) it described him as a "duffer" and said that "Sellers' game was running true to form" on the day Walsh was struck with the ball; (2) it stated that he "plays golf for business rather than pleasure" and "was working while golfing"; and (3) it stated that "At the third tee, his mind on a potential deal, Sellers hit the ball so awkwardly that it flew to the rear and struck one of his partners, James Walsh . . . As a result, Walsh was blinded in his left eye."

The libelous meaning Sellers ascribed to these statements was that they portrayed him as an overly materialistic or crass man, for whom business success overrides all concern for others, as well as a stupid, awkward and incompetent person.

In support of their complaint petitioners undertook extensive pretrial discovery, including (1) receiving answers to two sets of interrogatories which set forth in detail the editorial process of respondent; (2) examining the entire editorial reference file of respondent relating to the article; and (3) deposing at length each of the five individuals who participated in the preparation of the article.

On August 2, 1968 Time filed a motion to dismiss the complaint on the ground the article was not capable of a defamatory meaning as a matter of law, and for summary judgment on the grounds the article was constitutionally privileged under *New York Times* and privileged as a fair

report of judicial proceedings under the Pennsylvania common law of libel. The four members of Time magazine's New York editorial staff who participated in the preparation of the article confirmed their belief in the truth of the article, both in the depositions taken by petitioners and in affidavits filed in support of respondent's motion. Petitioners submitted no opposing affidavits.

On May 12, 1969, after completion of all relevant discovery, District Judge Kraft granted respondent's motion. He based his decision on three grounds: First, that the article was privileged under the common law of Pennsylvania as a fair report of judicial proceedings. Second, that the article was constitutionally privileged because it reported on a judicial decision of public interest and petitioners failed to offer evidence of any genuine issue of "actual malice". In the view of Judge Kraft, "The supporting affidavits attached to the motion together with the depositions and answers to interrogatories, manifestly demonstrate the complete lack of any knowledge of the falsity of the article or reckless disregard of the truth on the part of Time's employees." 299 F. Supp. at 586. Third, that the article was not capable of the defamatory meanings ascribed to it by petitioners.

Additionally, Judge Kraft found that the portions of the article complained of by petitioners, as set forth above, were "substantially accurate." 299 F. Supp. at 586. This finding is material with respect to petitioner William Sellers' new theory, not raised below, that the article invaded his common law right of privacy.

On March 20, 1970 the Court of Appeals for the Third Circuit affirmed the District Court's judgment dismissing the complaint, on the ground that the article, fairly and reasonably construed, was not capable of the libelous meanings ascribed to it by petitioners. Accordingly, the Court

of Appeals found it unnecessary to consider the privilege issues.

On April 24, 1970 the Third Circuit denied Sellers' petition for a rehearing.

ARGUMENT.

A. The Court of Appeals Decision Correctly Held That the Article Was Not Reasonably Capable of a Defamatory Meaning Under Pennsylvania Law.

In holding that the Time article was not capable of the defamatory meanings attributed to it by petitioners, the Third Circuit correctly applied established principles of the Pennsylvania common law of libel. Moreover, the Court of Appeals was correct in concluding that the District Court also so held, as a reading of Judge Kraft's opinion makes plain. But even if the Third Circuit did misread Judge Kraft on the issue of the article's capacity for defamatory meaning, it properly disposed of this action on a common law ground without reaching and deciding the constitutional privilege issue.

Accordingly, there is nothing for this Court to review. The Third Circuit has properly decided a question of state law, applying principles established and followed in a long line of Pennsylvania state court libel cases and, indeed, followed in most if not all other American jurisdictions. There is nothing new or novel in the Third Circuit's decision. It involves no issue of importance to anyone except the party litigants.

(1) The Third Circuit Tested the Article's Capacity for Defamatory Meaning in Accordance With Pennsylvania Law.

Petitioners concede, as they must, that the question of whether the article is capable of a defamatory meaning—that is, whether it can fairly and reasonably be construed to have the libelous meanings ascribed to it by petitioners—is a matter of law for the court under Pennsylvania law (P.

10).[3] *Sarkees v. Warner-West Corp.*, 349 Pa. 365, 368, 37 A. 2d 544, 546 (1944); *Bagash v. Elkins*, 405 Pa. 437, 440, 176 A. 2d 677, 678 (1962); *Clark v. Allen*, 415 Pa. 484, 487, 204 A. 2d 42, 43 (1964); *Kerwick v. Dardanell Press*, 428 Pa. 288, 294, 236 A. 2d 191, 194 (1967); *Restatement of Torts* § 614 (1938). Petitioners also concede that the article's capacity for defamatory meaning is to be tested against the effect it is fairly calculated to produce, the impression it would naturally engender, in the minds of the average persons among whom it is intended to circulate—that is, the average Time reader (P. 9). *Boyer v. Pitt Publishing Company*, 324 Pa. 154, 157, 188 A. 203, 204 (1936).

This is precisely what the Court of Appeals did, with painstaking care. The Court analyzed each of the sections of the article petitioners complained about and the libelous meanings ascribed to the words by the innuendos. It correctly pointed out that, under Pennsylvania law, innuendos may be used to define and explain the defamatory meaning attributed to words, but that they cannot be used to introduce new matter, to enlarge the natural meaning of the words, or to put an unfair and forced construction on the article. *McAndrew v. Scranton Repub. Pub. Co.*, 364 Pa. 504, 512, 72 A. 2d 780, 783 (1950); *Bagash v. Elkins*, *supra*, 405 Pa. at 440, 176 A. 2d at 679 (1962).

The Third Circuit, correctly applying the above principles of Pennsylvania law, held that the statements in the article that Sellers "plays golf for business rather than pleasure" and that his "game was running true to form"—which were limited to one activity, golf—could not fairly and reasonably be construed to have the meaning imputed to them by petitioners, namely, that they portrayed Sellers

3. References to the Petition for a Writ of Certiorari are cited herein as "P.".

as an overly materialistic or crass man for whom business success overrides all concern for others. The Court also held that the statement in the article that "'. . . his mind on a potential deal, Sellers hit the ball so awkwardly that it flew to the rear and struck one of his partners, James Walsh . . . .'", fairly read, states that Sellers hit an awkward shot because he had his mind on a potential deal; that to so state was not defamatory because not to concentrate properly in golf, to hit a ball awkwardly in golf, and to play golf for business are commonplace events; and that the tragic result of these commonplace events (the blinding of Walsh's left eye) did not impart a defamatory meaning to the article because the average Time reader would recognize that Sellers, the author of the "impossible" shot, could not have foreseen its occurrence or consequences.

The Third Circuit's decision is manifestly right, and clearly in accord with Pennsylvania case law. Compare *Clark v. Allen*, *supra*, a 1964 Pennsylvania Supreme Court decision holding an accusation that a United States senator's voting record exhibited "communist tendencies" was not libelous as a matter of law; and *Kernick v. Dardanell Press*, *supra*, a 1967 decision of the same court holding an accusation that a township auditor repeatedly brought "outrageous" and "baseless" charges "carefully calculated to disparage the township and its officials" which cost the taxpayers money to investigate was not libelous as a matter of law.

The principles followed in *Sarkees v. Warner-West Corp.*, *supra*, for determining capacity for defamatory meaning, which the Third Circuit relied on here, are the law of Pennsylvania today. The three cases discussed at some length in the petition as supporting petitioners' position that the Time article "was at least capable of a defamatory meaning" (P. 19) and as being in conflict with

Sarkees, correctly apply these same principles on the issue of capacity for defamatory meaning and do not support petitioners' position: *Friday v. Official Detective Stores, Inc.*, 233 F. Supp. 1021 (E. D. Pa. 1964); *Birl v. Philadelphia Electric Company*, 402 Pa. 297, 167 A. 2d 472 (1960); *Boyer v. Pitt Publishing Company, supra*.[4] In *Friday* and *Boyer*, the articles were clearly capable of imputing criminal conduct or involvement on the part of the plaintiffs; in *Birl* the slanderous statement was held capable of imputing that the plaintiff lacked honor and integrity, and was not a person to be relied on, insofar as his business dealings were concerned, because it categorically stated that his former employer would have no further dealings with the plaintiff.

Petitioners misread and misquote the Third Circuit's opinion when they claim that the Court applied a test of what the average Time reader would "probably" conclude upon a reading of the article (P. 11). No such test was stated or applied, as a reading of the opinion will demonstrate.

The issue of whether an article is capable of a defamatory meaning is not a fact issue under Pennsylvania law or under the general common law of libel. Nor does its resolution turn on a test which would find capacity for defamatory meaning unless "construing the facts in the light most favorable to plaintiff's position, reasonable men could not differ on the non-defamatory nature of the communication," as petitioners contend (P. 11). On the contrary, the test to be applied by the Court is "the effect the article is fairly calculated to produce, the impression it

4. The petition, at p. 18, quotes only the second of the two newspaper articles involved in *Boyer*. The omitted first article is the one principally relied on by the Pennsylvania Supreme Court as being reasonably capable of imputing perjury on the part of the plaintiff.

would naturally engender, in the minds of the average persons among whom it is intended to circulate." *Rogers v. Evil Publishing Company, supra.*

Petitioners' claim that their Seventh Amendment right of trial by jury has been violated by the Third Circuit's decision is thus wholly misconceived. The Seventh Amendment right to trial of civil actions by jury has never been absolute, as this Court has held from the beginning. See, *e.g., Capital Traction Co. v. Hof*, 174 U. S. 1, 19 (1898). Obviously the granting of motions to dismiss for failure to state a claim, for judgment on the pleadings and for summary judgment, in appropriate cases as here, are not in conflict with the right. All of the decisions of this Court cited in the petition in support of petitioners' claim that they have been deprived of their right to a jury trial involve rulings by lower courts that the evidence was insufficient for submission to a jury, where the court undertook to resolve testimonial conflicts, credibility issues and other questions of fact.

(2). The Third Circuit Properly Affirmed on a Common Law Ground.

As the Court of Appeals points out in its opinion, it is clear from Judge Kraft's opinion the District Court ruled that the Time article was not reasonably capable of a defamatory meaning. Nonetheless, petitioners' persist in their contention that the Third Circuit misconstrued the District Court's opinion and thus "evaded the vital issues of common law and constitutional privilege which formed the basis for the District Court's holding" (P. 9-10). But even assuming petitioners are right, and the Third Circuit and respondent wrong, it is clear that the Court of Appeals properly considered and decided the issue of the article's capacity for defamatory meaning without reaching the

privilege issues. Two principles are involved: First, as this Court has held, where two issues are raised, one of non-constitutional nature and the other of constitutional nature, and a decision of the non constitutional issue would make unnecessary a decision of the constitutional issue, a court of appeals should decide the former. *Alma Motor Co. v. Timken Detroit Axle Co.*, 329 U. S. 129, 136 (1946); *Rosenberg v. Fleuti*, 374 U. S. 449 (1963). Second, a Court of Appeals has the power to affirm a District Court if the result is correct even though its affirmance is based on grounds not considered or relied on below, and even though the District Court's decision was based on incorrect reasoning. *Helvering v. Gowran*, 302 U. S. 238, 245 (1937); *Viler Manufacturing Co. v. Government of Virgin Islands*, 351 F. 2d 313, 317 (3d Cir. 1965). Plainly, then, the Third Circuit had the power and duty to affirm on the ground that the article was not reasonably capable of a defamatory meaning as a matter of law, if even the District Court had not so held or had applied the wrong test in so holding.

(3) Petitioners' Alternative Invasion of Privacy Theory of Recovery.

Petitioner Sellers asks this Court to review on certiorari the alleged error of the Court of Appeals in failing to remand the action to the District Court on the issue of invasion of privacy, claiming that the District Court in turn erred in not holding that Sellers was entitled to have the privacy issue passed upon by a jury. As already pointed out, this alternative privacy theory of recovery was raised for the first time in the petition for rehearing by the Third Circuit, based upon an oblique reference to it in petitioners' reply brief, asserting that the Court of Appeals had "completely overlooked and failed even to discuss" Sellers' footnote reference to the fact that "his cause of

action may also be sustained under the Pennsylvania common law principle of invasion of privacy" (Pet. for Rehearing, p. 9). Petitioners' complaint sounds solely in libel. At no time did Sellers claim or suggest in the District Court, directly or indirectly, that his right of privacy had been invaded by publication of the Time article.

The Third Circuit follows the consistent practice of refusing to consider issues, theories, and questions not raised below when reviewing decisions of District Courts. *Shafer v. Reo Motors, Inc.*, 205 F. 2d 685 (3d Cir. 1953); *In Re Linda Coal and Supply Co.*, 255 F. 2d 653 (3d Cir. 1958). This Court has approved the Third Circuit's practice, stating that a Court of Appeals should not review or consider issues not raised below except in exceptional circumstances where a failure to do so would lead to a "plain miscarriage of justice." *Hormel v. Helvering*, 312 U. S. 552 (1941). And this Court itself, in *Virginian Railway Company v. Mullens*, 271 U. S. 220, 227 (1926), following grant of certiorari, refused to consider on review a new theory of liability not raised below by the plaintiff-appellee.

There are no special circumstances warranting review by this Court of petitioners' new theory of recovery. In effect, petitioners are asking this Court to review and correct a mistake made by their counsel; not a mistake made by the Court of Appeals or by the District Court. The new issue involves the question of whether Sellers has a cause of action, under the common law of Pennsylvania, for invasion of privacy based on the publication of Time's report of a judicial decision of public interest, in litigation in which Sellers was a party. It is a matter of state law, and its resolution is important to no one except the parties to this action.

Moreover Sellers' eleventh hour claim that his present action can be sustained under a common law privacy theory

is without substantive merit, in view of the decision of the District Court. The Pennsylvania cases dealing with the right of privacy establish that press reports of court proceedings, including routine divorce actions, are privileged. Those involved in a court proceeding, however unwillingly and whether as parties or witnesses or because of their relationship to parties or witnesses, become objects of public interest; and the press is privileged to report the event and their connection with it. *Acquino v. Bulletin Company*, 190 Pa. Super. 528, 534-36, 154 A. 2d 422, 426-27 (1959). The privilege may be lost, where, as in *Acquino*, the article dealing with the spite marriage and divorce of the daughter of the plaintiffs was in the nature of fiction and not a news report, the facts were embellished, sensationalized and fictionalized, and the story bedecked with a large drawing bearing no resemblance to the divorced couple. In *Acquino*, the Superior Court quite properly held that the lower court correctly left it to the jury to determine whether the purpose of the article was not the reporting of news but to amuse and astonish the reading public and whether the publisher should have realized the article would be offensive to persons of ordinary sensibilities, thereby constituting an unwarranted invasion of the privacy of the parent plaintiffs.

The District Court, in its opinion in this action, held that the Time article was privileged as a fair report of judicial proceedings. That holding was based on a record which included the court decision reported on and the depositions of the parties to the action. In so holding, the District Court necessarily found that Time's report was a substantially accurate summary of the proceeding, containing no significant omissions and no exaggerated additions or embellishments. Under Pennsylvania law the fair report privilege is not lost by the inclusion in the report of comment fairly based on the contents of the record in

the proceeding. *Sciandra v. Lynett*, 409 Pa. 595, 187 A. 2d 586 (1963); *Cresson v. North American Co.*, 280 Pa. 373, 124 A. 495 (1924). Consistent with that finding, the District Court held that the privilege was not lost by the use of a lively prose style and "color" to enliven an otherwise routine and dull account of a legal decision. 299 F. Supp. at 585. District Judge Kraft also found that the alleged defamatory portions of the article were substantially accurate, that the comment on the undisclosed state of Sellers' mind was fair, and that the language complained of "could only offend a person of the most highly developed sensibilities". 299 F. Supp. at 586.

It follows, therefore, that had petitioners asserted in the District Court a claim that Time's report of Judge Luongo's decision in *Walsh v. Sellers* constituted an actionable invasion of Sellers right of privacy, Judge Kraft would have held it privileged as a matter of law for purposes of the privacy cause also. Judge Kraft's opinion wholly precludes even the possibility of a ruling by him that Time's report was a substantially fictionalized account of the court proceeding and Sellers' connection with it, and the privilege thereby lost.

Judge Kraft also held that Time's article was constitutionally privileged as a matter of law under *New York Times* principles against claims for defamation. The decision of this Court in *Time, Inc. v. Hill*, 385 U. S. 374 (1967), applying the constitutional privilege in a privacy action to a matter of public interest (an article dealing with the opening of a Broadway play), mandates the same holding as respects petitioners' new privacy cause of action.

In summary, the Court of Appeals has correctly applied the applicable state law in affirming the District Court's holding that the Time article was not reasonably

capable of a defamatory meaning as a matter of law. Its decision is entirely in accord with the large number of Pennsylvania Supreme Court cases dealing with the common law of libel, which have consistently held that the issue of capacity for defamatory meaning is a question of law for the court. Its decision follows to the letter the principles applied by Pennsylvania courts in resolving that issue. Four federal court judges, who are constantly required to pass upon Pennsylvania law questions, are in agreement that the challenged article is not reasonably capable of a defamatory meaning. Under the circumstances there is no reason for this Court to deviate from its announced general policy and leave undisturbed this Court of Appeals' holding on a question of state law.

B. The District Court Decision Is Correct in Holding That the Time Article Was Constitutionally Privileged.

Petitioners ask this Court to review the District Court's application of First Amendment protection under *New York Times* principles to Time's report of a judicial decision of substantial public interest, even though the Court of Appeals affirmed the District Court's judgment for respondent on common law grounds and accordingly did not reach the constitutional privilege issue. Petitioners' primary contention is that the application of First Amendment protection to Time's report by the District Court represents an unwarranted extension of *New York Times* principles, and that the Court of Appeals evaded its duty in not reaching the issue and reversing the District Court. In the final paragraph of their petition, they also challenge the District Court's holding that the record before it demonstrated a complete lack of "actual malice" in the *New York Times* sense on the part of respondent's employees.

Petitioners are wrong in both contentions. The application of First Amendment protection to Time's report by the District Court is entirely consistent with and supported by the decisions of this Court and the decisions of lower federal courts applying the principles of *New York Times*. There therefore is no need for review by this Court of the District Court's holding on constitutional privilege.

(1) The First Amendment Protection Applies to Publications of Matters of Public Interest.

Petitioners' argument is basically that the District Court erred in holding that the Time article was constitutionally privileged under *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964) and related cases,[5] because they do not extend such protection beyond statements concerning "public officials" and "public figures" to matters of public interest.

Petitioners are plainly wrong, as should now be apparent. The basis of *New York Times* was that "freedom of expression upon public questions is secured by the First Amendment.'" 376 U. S. at 269. This Court has specifically applied the constitutional privilege in libel actions to public officials [*New York Times*]; public figures, both nationally known [*Butts*] and local [*Greenbelt*]; and, in a false light privacy action, to a matter of public interest (the opening of a Broadway play) [*Hill*]. In its decisions since *New*

5. Those cases include *Garrison v. Louisiana*, 379 U. S. 64 (1964); *Henry v. Collins*, 380 U. S. 356 (1965); *Linn v. United Plant Guard Workers*, 383 U. S. 53 (1966); *Rosenblatt v. Baer*, 383 U. S. 75 (1966); *Time, Inc. v. Hill*, 385 U. S. 374 (1967); *Curtis Publishing Co. v. Butts*, 388 U. S. 130 (1967); *Beckley Newspapers Corp. v. Hanks*, 389 U. S. 81 (1967); *St. Amant v. Thompson*, 390 U. S. 727 (1968); *Pickering v. Board of Education*, 391 U. S. 563 (1968); *Greenbelt Cooperative Publishing Association, Inc. v. Bresler*, 90 S. Ct. 1537 (1970).

York Times this court has continued to emphasize that freedom of expression upon public questions is secured by the First Amendment.[6] It is clear, therefore, that the foundation of the privilege first set forth in *New York Times* is the public's right to be informed concerning matters of public interest.

The courts of appeals have so understood, and have applied the privilege to matters of public interest in *United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc.*, 404 F. 2d 706 (9th Cir. 1968), *cert. denied*, 394 U. S. 921 (1969) (television broadcast dealing with mail order medical laboratories); *Time, Inc. v. McLaney*, 406 F. 2d 565 (5th Cir.), *cert. denied*, 395 U. S. 922 (1969) (article dealing with election campaign in Bahamas); *Rosenbloom v. Metromedia, Inc.*, 415 F. 2d 892 (1969), *cert. granted*, 397 U. S. 904 (1970); (radio broadcasts dealing with police arrests of dealers and distributors of allegedly obscene magazines); *Wasserman v. Times, Inc.*, 424 F. 2d 920 (D. C. Cir. 1970) (article dealing with police arrests of top Mafia leaders in a public restaurant); *Bon Air Hotel, Inc. v. Time, Inc.*, — F. 2d — (5th Cir. 1970) [No. 27,490, May 6, 1970] (article dealing with upcoming Masters' Golf Tournament and public accommodations available for spectators).[7] So also have a number of federal district courts [e.g., *Grove v. Dun & Bradstreet, Inc.*, 308 F. Supp. 1068 (W. D. Pa. 1970) (mercantile credit report)], and state courts [e.g., *Grayson v. Curtis Publishing Co.*, 72 Wash. 999, 436 P. 2d 756 (1967) (article dealing with unsportsmanlike conduct of basketball coaches, players and officials)].

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6. *Garrison*, 379 U. S. at 74-75; *Rosenblatt*, 383 U. S. at 75, 86; *Pickering*, 391 U. S. at 573-74; *Butts*, 388 U. S. at 147; *Hill*, 385 U. S. at 387-88.

7. The opinion of the Court of Appeals for the Fifth Circuit in *Bon Air Hotel, Inc. v. Time, Inc.*, which is not yet reported, is attached hereto as Appendix A.

The decision of Judge Luongo in *Walsh v. Sellers*, on which Time reported, was prominently featured in Section 1 of the April 19, 1966 issue of United States Law Week under the bold face heading "Golfer Does Not Assume Risk Of Injury by 'Impossible' Shot". The opening sentences of Law Week's comment read: "Let the duffer beware. His playing partners do not assume the risk of his negligence and ineptitude, according to the U. S. District Court for Eastern Pennsylvania." Key portions of Judge Luongo's opinion were reprinted in Section 2 of that issue, under the general heading "Significant Opinions Not Yet Generally Reported".

Judge Luongo's decision involved a ruling of particular public interest, not only to the legal profession but to laymen as well. Millions of Americans who participate in sports doubtless believe that they cannot recover for any injuries they may sustain during those activities or that they cannot be held liable for injuries which they themselves inflict. *Walsh v. Sellers* presented an unusual factual situation of almost textbook ingenuity in which the extent of the "assumption of risk" doctrine for golfers (and by analogy, other sports) could be clarified. Judge Luongo's opinion severely limited that doctrine, holding that a person assumes the risk of being hit by a golf ball only when he is standing in the "apparent orbit" of the shot. In short, the decision undoubtedly was of more immediate interest to the American public than the latest ruling of this Court concerning patent issues or antitrust law.

Time's report stuck to the point. It did not deal with Sellers' personal life as petitioners suggest, or otherwise report extraneous information. The information in the article came from the record on which Judge Luongo based his decision, which included the depositions of the parties. The statement that Sellers played golf for business reasons

was the explanation for the otherwise curious fact that the action was brought not only against him personally but also against his company.

The decision in *Walsh v. Sellers* was obviously a matter of legitimate public interest. District Judge Kraft correctly interpreted and applied the principles of *New York Times* in holding that the judicial decision, which he found involved "two outstanding points of reader interest . . . the unusual flight of the ball and the legal decision that the defense of assumption of risk was inapplicable under the particular facts," was "a matter of public interest" and that therefore Time's report was constitutionally privileged. 299 F. Supp. at 586.

(2) Respondent Is Entitled to Summary Judgment.

The record upon which the District Court based its grant of summary judgment for respondent was a complete one. In addition to Judge Luongo's opinion in *Walsh v. Sellers* and the depositions of Walsh and Sellers in that case, on which Time's report was based, the record included the following: (1) Respondent's answers to two sets of interrogatories, setting forth in detail the editorial process relating to the article; (2) Time's editorial reference file relating to the article; (3) The depositions of the five individuals who participated in the preparation of the article and who were examined at length by petitioners' counsel—Time's Philadelphia correspondent, Time's Managing Editor, the writer of the article, its editor, and the researcher who checked it for accuracy; and (4) The supporting affidavits of the article's writer, editor and researcher, all of whom verified their belief in the truth of the article when it was published. Petitioners submitted no opposing affidavits.

As the District Court's opinion indicates, Judge Kraft applied the correct standard in examining the complete record to determine whether petitioners could prove "actual malice" as defined in *New York Times*. He pointed out that petitioners, to overcome the constitutional privilege, "must prove with 'convincing clarity' that the statement was false and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true", citing *New York Times*. 299 F. Supp. at 584, n. 2. Based on that examination, and applying the correct standard, Judge Kraft concluded that the documents comprising the record ". . . manifestly demonstrate the complete lack of any knowledge of the falsity of the article or reckless disregard of the truth on the part of Time's employees. The plaintiff has submitted no affidavits to the contrary, and, so, has failed to offer evidence of the existence of any genuine issue of actual malice." 299 F. Supp. at 586. Judge Kraft also found that the portions of the article claimed by petitioners to be defamatory ". . . are substantially accurate." 299 F. Supp. at 586.

Since the procedure followed by the District Court in assessing the evidence was clearly in accord with the constitutional standard laid down by this Court in *New York Times*, and repeated and amplified in *Garrison* and *St. Amant*, there is no need for this Court to review the District Court's finding that there was constitutionally insufficient evidence to take petitioners to a jury on the issue of actual malice.

This Court has pointed out in *New York Times*, 376 U. S. at 279, and in *Hill*, 385 U. S. at 389, that fear of the expense of trial is as great a threat to free discussion of matters of public interest as fear of large libel verdicts. Thus, free exercise of First Amendment rights requires that summary judgment be granted as soon as it becomes

clear that a plaintiff cannot establish "actual malice". Summary judgment was granted for the defendant publisher, in applying the constitutional principles of *New York Times*, in *Washington Post Co. v. Keogh*, 365 F. 2d 965, 968 (D. C. Cir. 1966), *cert. denied*, 385 U. S. 1011 (1967), *Time, Inc. v. McLaney*, *supra*, and *Bon Air Hotel, Inc. v. Time, Inc.*, *supra*, among numerous other First Amendment cases in federal and state courts. Summary disposition was appropriate here.

C. The District Court Decision Is Correct in Holding That the Time Article Was Privileged as a Fair Report of Judicial Proceedings.

Petitioners ask this Court to review on certiorari another question of state law—the holding of the District Court that Time's article was privileged as a fair report of judicial proceedings under the common law of libel. Again the holding of the District Court is in accord with Pennsylvania state court libel cases, involves nothing new or novel, and is of importance to no one except the party litigants.

Numerous Pennsylvania decisions establish that a report on the contents of public records, including those of judicial proceedings, is qualifiedly privileged against a libel claim. *Sciandara v. Lynett*, 409 Pa. 595, 187 A. 2d 586 (1963); *Boyer v. Pitt Publishing Company*, 324 Pa. 154, 188 A. 203 (1936). It is clear that such records as judicial opinions and deposition transcripts are within the coverage of the privilege. *Mengel v. Reading Eagle Co.*, 241 Pa. 367, 88 A. 660 (1913); *Wachs v. Ramp Consulting Services, Inc.*, 28 D. & C. 2d 201 (C. P. Montg. Co. 1961). The privilege is a bar to the libel claim unless the plaintiff establishes that the report is not a substantially accurate summary, as by a showing of significant omissions or of exaggerated

additions and embellishments; or that the report was published solely for the purpose of causing him harm. *Sciandra v. Lynett, supra*, 409 Pa. at 600-601, 187 A. 2d at 589.

The privilege allows the press reasonable freedom in reporting on judicial proceedings. It permits the use of a lively prose style and "color" to enliven an otherwise routine and dull account of a legal decision, as the District Court held. Comment fairly based on the contents of the record is permitted. *Sciandra v. Lynett, supra, Cresson v. North American Co.*, 280 Pa. 373, 124 A. 495 (1924). In *Sciandra*, for example, the Pennsylvania Supreme Court held that a series of newspaper articles concerning an official New York State report on a meeting at Appalachin, N. Y., widely suspected of being a business meeting of underworld overlords and their vassals, was privileged as a matter of law even though the series used language not contained in the official report, such as a headline reading "Barbecue Gives Four A Bellyache" and such phrases as "gangland convention," "infamous gangland meeting" and "so-called hoodlum meeting." The court said the plaintiff's complaint about such language was without merit or justification in view of the information contained in the report concerning the police records of his traveling companions.

Petitioners challenge the holding of the District Court that the article was privileged as a fair report of a judicial proceeding on the ground Time's report "is not accurate or complete, or at least a fair abridgment of the proceedings" (P. 28), and apparently on the ground the statements in the article claimed to be libelous constitute unfair comment. But Judge Kraft, with the record in *Walsh v. Sellers* (including Judge Luongo's opinion and Sellers' deposition) before him, held that the statements complained of were substantially accurate and fair based on that record.

Moreover Judge Kraft held that "The Time article, read as a whole, fairly reports the result of Judge Luongo's decision." 299 F. Supp. at 585.

The District Court's holding on the Pennsylvania common law privilege issue was clearly correct and in accord with Pennsylvania case law. Review by this Court of the District Court's holding on a question of state law plainly is not warranted.

CONCLUSION.

The petition does not present any questions warranting review by this Court and should be denied.

Respectfully submitted,

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August 21, 1970.

APPENDIX A.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27490

BON AIR HOTEL, INC.,
Plaintiff-Appellant,

versus

TIME, INC. and DAN JENKINS,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Georgia

(May 6, 1970)

Before RIVES, COLEMAN and MORGAN, *Circuit Judges.*

RIVES, Circuit Judge: Bon Air appeals from the district court's order granting Time, Inc. and Dan Jenkins' (hereinafter referred to as Time) motion for summary judgement. *Bon Air Hotel, Inc. v. Time, Inc.*, 295 F. Supp. 704 (S. D. Ga. 1969).

Appellant, owner of the Bon Air Hotel in Augusta, Georgia, brought this libel action against Time for an article written by Jenkins and published in its magazine Sports Illustrated. Time's initial motion for summary judgment was denied by Judge Scarlett on December 20, 1967. On March 4, 1968, this Court denied Time's application for leave to appeal under 28 U. S. C. A. § 1292(b). Subsequently, the Supreme Court denied certiorari. 383 U. S. 859. Meanwhile Judge Scarlett had retired. Further proceedings were held before his successor, Judge Lawrence. On January 30, 1969, Judge Lawrence, pursuant to Rule 60(b), Fed. R. Civ. P., vacated Judge Scarlett's order and granted Time's motion for summary judgment.

Bon Air contends that the district court's order should be reversed on the grounds that: (1) The district court erred in applying the *New York Times*[1] rule to the publication in question; (2) the district court denied Bon Air due process of law in granting the motion for summary judgment without notice or opportunity for hearing; and (3) the district court erred in granting summary judgment.

The facts surrounding the publication will be mentioned only briefly since the district court's opinion sets forth the facts in detail. The April 6, 1964 issue of Sports Illustrated was devoted in large part to the Masters' Golf Tournament which is held each April in Augusta, Georgia. This issue included an article written by Jenkins, a well-known sports writer, who had visited Augusta during the week of the Tournament for fourteen years. The article described conditions under which the Tournament was held, accommodations available in Augusta for both players and spectators, and, in particular, conditions at the Bon Air Hotel. Examining the present condition of the hotel and past experiences of its guests during the week of the Tournament, Jenkins focused on the

1. New York Times Co. v. Sullivan, 376 U. S. 254 (1964).

"decline into dishevelment of the Bon Air Hotel though the general theme was Augusta and the Masters Tournament. According to the author, 100,000 golf enthusiasts visit that city each year when it is played. Millions watch the event on television. For over twenty years prior to 1960 the Bon Air had been a landmark of the Masters scene. It was part and parcel of the Tournament. As the article says, 'The Bon Air was the place to be, and to be seen.' During the period 1961-1964 the hotel was closed for fifty-one weeks for each year and was opened only for the week of the Masters. The author had stayed at or visited the Bon Air for thirteen years and had observed first hand its alleged decline from the status of *grande dame* into the station of a dowdy, decrepit and disheveled old woman."

295 F. Supp. at 707.

I. *New York Times Issue.*

The district court held the case was a proper one for application of the actual malice standard of *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964). Bon Air contends this holding is erroneous in that (1) the *New York Times* rule applies only to defamation of "public officials" and "public figures" and (2) assuming that *New York Times* is applicable, the subject matter of the publication in question is not of sufficient public interest to warrant first amendment immunity. We conclude that both contentions are without merit.

In *New York Times* the Supreme Court held that the first amendment limits a state's power to award damages in a libel action brought by a public official against critics of his official conduct. The rationale of the decision was that in the area of free debate, where exaggeration and misstatement are inevitable, freedom of expression must

have the breathing space it needs to survive regardless of "the truth, popularity, or social utility" of the statements. 376 U. S. at 271. However, the Court conditioned the first amendment protection on a lack of actual malice, *i.e.*, knowledge that a statement is false or reckless disregard of whether or not it is false. In *Curtis Publishing Co. v. Butts*, 388 U. S. 130 (1967), the Court extended the first amendment guarantees to misstatement of fact in discussing public figures.

The question before us is whether the first amendment protection, extended to public officials in *New York Times* and to public figures in *Butts*, applies to publication concerning matters of public interest. In decisions since *New York Times*, the Court has continued to emphasize that freedom of expression upon public questions is secured by the first amendment.[2] This Court in *Time, Inc. v. McLaney*, 406 F. 2d 565 (5 Cir.), *cert. den.*, 395 U. S. 922 (1969), noted that the *New York Times* actual malice standard is applicable to publications involving matters of great public interest.[3]

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2. *See* Garrison v. Louisiana, 379 U. S. 64, 74-75 (1964); Rosenblatt v. Baer, 383 U. S. 75, 86 (1966); Curtis Publishing Co. v. Butts, *supra* at 150-52; Pickering v. Board of Education, 391 U. S. 563, 573-74 (1968). In *Butts*, Justice Harlan (announcing the judgment of the Court) relied on a phrase from Thornhill v. Alabama, 310 U. S. 88, 102 (1940), that freedom of discussion "'must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.'" 388 U. S. at 147. In Time, Inc. v. Hill, 385 U. S. 374 (1967), the Court denied recovery in an action brought under New York's right of privacy statute. Relying on *New York Times*, the Court held that "the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth." *Id.* at 387-88.

3. The Court in *McLaney* predicated its application of the *New York Times* standard on McLaney's active participation in matters of important public concern. McLaney, Like General Walker in

Since the *Butts* decision, which extended first amendment protection to public figures, numerous lower courts have extended application of the actual malice standard to publications possessing a valid public interest.[4] We agree with these decisions that publications concerning matters of public interest are protected by the first amendment absent proof of actual malice.

Bon Air also contends that, if the *New York Times* actual malice standard applies to publications discussing matters of public interest, the article in Sports Illustrated is not of sufficient public interest to warrant first amendment immunity. In particular, Bon Air argues that the Masters' Golf Tournament does not make an inconspicuous and little-known hotel a matter of such public interest.

In rejecting this contention, the district court found that the national interest in the particular event and the

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3. (cont'd)
Curtis Publishing Co. v. Butts, *supra*, had thrust his personality into the "vortex" of an important public controversy. The Court, however, did not attempt to limit *New York Times* to public officials and public figures, but agreed with the Ninth Circuit's decision in United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc., 404 F. 2d 706 (9 Cir. 1968), which applied the actual malice standard to matters of legitimate public interest.

4. Wasserman v. Time, Inc., — F. 2d — (D. C. Cir. 1970) [No. 23,267, Mar. 3, 1970]; Rosenbloom v. Metromedia, Inc., 415 F. 2d 892 (3 Cir. 1969); United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc., 404 F. 2d 706 (9 Cir. 1968); Holmes v. Curtis Publishing Co., 303 F. Supp. 522 (D. S. C. 1969); Cerrito v. Time, Inc., 302 F. Supp. 1071 (N. D. Cal. 1969); Ragano v. Time, Inc., 302 F. Supp. 1005 (M. D. Fla. 1969); Arizona Biochemical Co. v. Hearst, 302 F. Supp. 412 (S. D. N. Y. 1969); DeSalvo v. 20th Century-Fox Corp., 300 F. Supp. 742 (D. Mass. 1969); Sellers v. Time, Inc., 299 F. Supp. 582 (E. D. Pa. 1969); Altoona Clay Prods., Inc. v. Dun & Bradstreet, Inc., 286 F. Supp. 809 (W. D. Pa. 1968); Cullen v. Grove Press, Inc., 276 F. Supp. 727 (S. D. N. Y. 1967); All Diet Food Distributors, Inc. v. Time, Inc., 290 N. Y. S. 2d 445 (Sup. Ct. 1967); *see* Time, Inc. v. McLaney, 406 F. 2d 565 (5 Cir. 1969). *See also* Curtis Publishing Co. v. Butts, 351 F. 2d 702, 721-22 (5 Cir. 1965) (Rives, J., dissenting).

interest of 100,000 golf enthusiasts in the accommodations in Augusta during the Masters' Tournament constituted a valid public interest. We agree. Although some "public interest" cases have dealt with matters of a more critical nature, *e.g.*, public health[5] and organized crime,[6] we conclude that Time's article, focusing on Augusta, the Masters' Golf Tournament and the public accommodations available for the many thousands of spectators, was of a legitimate public interest.[7] For these reasons, the district court did not err in applying the *New York Times* actual malice standard to the publication in question.

II. *Denial of Due Process.*

Bon Air next contends that it was denied due process of law when the district court granted Time's motion for summary judgment without notice or opportunity to develop a case by oral argument or by presentation of evidence.

The district court on January 20, 1969, wrote counsel and inquired whether the court had the power, and if so whether it should be exercised under the circumstances, to vacate the court's previous denial of Time's motion for summary judgment. Counsel for Time replied that the court did have the power to vacate and suggested that his letter be treated as a motion for reconsideration of Time's earlier motion for summary judgment. On January 23 the court notified counsel that it was treating the letter as a

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5. United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc., *supra*.

6. Wasserman v. Time, Inc., *supra*; Cerrito v. Time, Inc., *supra*; Ragano v. Time, Inc., *supra*; Time, Inc. v. McLaney, *supra*.

7. *See* Rosenbloom v. Metromedia, Inc., *supra* (obscence literature); Sellers v. Time, Inc., *supra* (freak accident on golf course and resulting action for damages); Altoona Clay Prods., Inc. v. Dun & Bradstreet, Inc., *supra* (credit information).

motion to vacate the earlier order denying summary judgment and also as a motion to reopen Time's earlier motion for summary judgment. Counsel for Bon Air, in replying to the court on January 27, 1969, conceded that the court had the power to vacate the earlier order denying summary judgment but urged the court not to exercise that power. On January 30, 1969,[8] the court granted Time's motion for summary judgment.

The district court's denial of Time's motion for summary judgment on December 20, 1967, was only an interlocutory order and thus not subject to being vacated under Rule 60(b), Fed. R. Civ. P.[9] However, because the order was interlocutory, "the court at any time before final decree [could] modify or rescind it." *John Simmons Co. v. Grier Brothers Co.*, 258 U. S. 82, 88 (1922); see *Carter v. American Bus Lines, Inc.*, 22 F. R. D. 323, 325 (D. Neb. 1958); *Kliaguine v. Jerome, supra.* Thus, vacating the earlier order was within the district court's power, and we do not find that the court abused its discretion. *See Marconi Wireless Telegraph Co. v. United States*, 320 U. S. 1, 47-48 (1943).

Rule 56(c), Fed. R. Civ. P., provides that the "motion [for summary judgment] shall be served at least 10 days before the time fixed for the hearing." This Court has interpreted Rule 56(c) as requiring notice to the adverse party and a hearing.[10]

We are of the opinion that both of these requirements were complied with in the district court. Through the dis-

8. Although the order is dated January 29, 1969, it was filed with the clerk on January 30.

9. Kliaguine v. Jerome, 91 F. Supp. 809, 810 (E. D. N. Y. 1950); *see* 6 Moore Federal Practice §§ 56.14[2], 60.20 (2d ed. 1966).

10. Georgia Southern & Fla. Ry. Co. v. Atlantic Coast Line R. R. Co., 373 F. 2d 493, 496-97 (5 Cir. 1967); Enochs v. Sisson, 301 F. 2d 125, 126 (5 Cir. 1962). See also Bowdidge v. Lehman, 252 F. 2d 366 (6 Cir. 1958).

trict judge's letter to counsel on January 20, 1969, and the court's notification on January 23, 1969, Bon Air received sufficient notice that the district court was reconsidering Time's motion for summary judgment.

The following factors are relevant in our consideration of the question of whether Bon Air was allowed to be heard on the summary judgment motion: (1) Oral argument was conducted on Time's original motion for summary judgment, which was denied; (2) Bon Air filed briefs in opposition to Time's petition in this Court for leave to appeal the denial of its motion and also in opposition to Time's petition for rehearing of this Court's denial of the above petition; (3) affidavits and interrogatories with Time and Dan Jenkins' answers thereto were filed with the district court by Bon Air; (4) on January 27, Bon Air submitted a letter to the district court, together with a pretrial brief, and urged that the district court should not vacate its earlier denial of Time's summary judgment motion, for the principal reason that the case should proceed to trial and should not be disposed of through summary judgment. The combination of these factors convinces us that Bon Air was "heard," within the meaning of Rule 56(e), on the reconsideration of Time's motion for summary judgment. The fact that an oral hearing was not held on the court's reconsideration of Time's motion does not amount to noncompliance with Rule 56(e) or a denial of due process.[11]

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11. *See* Hilton v. W. T. Grant & Co., 212 F. Supp. 126, 128-29 (W. D. Pa. 1962). *See also* Federal Communication Comm'n v. WJR, the Goodwill Station, Inc., 337 U. S. 265, 274-77 (1949). Another consideration is Bon Air's inaction. Because this was a reconsideration of Time's earlier motion for summary judgment, it seems to us that Bon Air should have presented any additional evidence through affidavits or otherwise under Rule 56(e), Fed. R. Civ. P., and if time had not permitted it to do so, should have requested the district court to reconsider its order granting summary judgment. In the absence of some such action on Bon Air's part, we are left to mere speculation as to whether any additional evidence was available to Bon Air.

III. *Summary Judgment.*

Having concluded that *New York Times'* actual malice standard was applicable to the publication in question, the district court examined the record and granted Time's motion for summary judgment. The court held the record "devoid of any showing that defamatory statements were published by defendant Time . . . with knowledge of their falsity or with a reckless disregard of whether they were true or false." 295 F. Supp. at 709. We agree with the district court that the record was totally devoid of facts from which Bon Air could prove that statements were made by Time and Jenkins with actual malice, and proceed to state our views at some length.

The Supreme Court in *New York Times* conditioned the first amendment privilege to make misstatement of facts on the absence of a publisher's actual malice, *i.e.*, with actual knowledge of a statement's falsity or with reckless disregard of its falsity. 376 U. S. at 279-80. In *Garrison v. Louisiana*, *supra* at 74, "reckless disregard" is defined as "high degree of awareness of probable falsity," and in *St. Amant v. Thompson*, 390 U. S. 727, 731 (1968), as "serious doubts as to the truth." [12] In addition, the Court

12. In its most complete statement on the "reckless disregard" element of actual malice, the Court in *St. Amant* explained:

> "'Reckless disregard,' it is true, cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be marked out through case-by-case adjudication, as is true with so many legal standards for judging concrete cases, whether the standard is provided by the Constitution, statutes, or case law. Our cases, however, have furnished meaningful guidance for the further definition of a reckless publication. In *New York Times*, *supra*, the plaintiff did not satisfy his burden because the record failed to show that the publisher was aware of the likelihood that he was circulating false information. In *Garrison v. Louisiana*, 379 U. S. 64 (1964), also decided before the decision of the Louisiana Supreme Court in this case, the opinion emphasized the necessity for a showing that a false publication was made with a 'high degree of awareness of . . . probable falsity.' . . .

placed a heavy burden of proof on plaintiffs—actual malice must be proved with "convincing clarity." [13]

Actual malice is a constitutional issue to be decided initially by the trial judge vis-à-vis motions for summary judgment and directed verdict. The functions of the trial court judge and the jury have been explained as follows:

> "In my judgment *New York Times Co. v. Sullivan* makes actual malice a constitutional issue to be decided in the first instance by the trial judge applying the *Times* test of actual knowledge or reckless disregard of the truth. *Cf. Jackson v. Denno*, 378 U. S. 368 (1964). Unless the court finds, on the basis of pretrial affidavits, depositions or other documentary evidence, that the plaintiff can prove actual malice in the *Times* sense, it should grant summary judgment for the defendant . . . .
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> "If the case survives the defendant's summary judgment motion, the trial court at the close of the plaintiff's case must decide whether actual malice has been shown with 'convincing clarity.' In making this judgment the court will judge the credibility of the witnesses and draw its own inferences from the evidence. If the trial is permitted to proceed, the court

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12. (cont'd)

These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. *There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.* Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice."

390 U. S. at 730-31 [emphasis added].

13. New York Times Co. v. Sullivan, *supra* at 285-86; *see* Cepeda v. Cowles Magazines & Broadcasting, Inc., 392 F. 2d 417 (9 Cir. 1968); Rangano v. Time, Inc., 302 F. Supp. 1005, 1010 (M. D. Fla. 1969).

> will be called upon again to make a judgment on the actual malice issue at the close of all of the evidence. If the motion for a directed verdict at this stage of the trial is denied, the actual malice issue, along with the other issues, is then submitted to the jury under the *Times* instruction without any indication from the court or counsel that the court has decided that the evidence shows actual malice with 'convincing clarity.'" [Citations and footnotes omitted.]

Wasserman v. Time, Inc., — F. 2d — (D. C. Cir. 1970) [No. 23,267, Mar. 3, 1970, slip opinion pp. 4-5] (Wright, J., concurring). Such two-step procedure "provides the protection of the First Amendment freedom that *Times* sought to make secure in areas of public concern" *Id.* at 5. *Compare Rosenblatt v. Baer*, 383 U. S. 75, 88 n. 15 (1966).

Thus it is clear that, where a publication is protected by the *New York Times* immunity rule, summary judgment, rather than trial on the merits, is a proper vehicle for affording constitutional protection in the proper case. Judge Tuttle in *Time, Inc. v. McLaney*, *supra* at 566, recognized the appropriateness of summary judgment:

> "The subject matter of this litigation, involving as it does, the very serious and timely question of how far the First Amendment guarantee of freedom of the press may still be impinged upon by actions for libel, places some cases in a somewhat different category. This follows when the trial court and this court jointly consider that the failure to dismiss a libel suit might necessitate long and expensive trial proceedings, which, if not really warranted, would themselves offend the principles enunciated in *Dombrowski v. Pfister*, 380 U. S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22, because of the chilling effect of such litigation."

The District of Columbia Circuit placed a similar emphasis on the role of summary judgments in defamation actions:

> "In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate. . . . Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors. And to this extent debate on public issues . . . will become less uninhibited, less robust, and less wide-open, for self-censorship affecting the whole public is 'hardly less virulent for being privately administered.' Smith v. People of State of California, 361 U. S. 147, 154, 80 S. Ct. 215, 219, 4 L. ED. 2d 205 (1959)."

Washington Post Co. v. Keogh, 365 F. 2d 965, 968 (D. C. Cir. 1966).

Numerous courts have found summary judgment for publishers proper where the record is devoid of genuine issues of fact as to whether the alleged defamatory statement was published with actual knowledge of its falsity or with a reckless disregard of whether it was true or false.[14] Other courts, however, have not allowed a publisher's motion for summary judgment where facts were presented

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14. Time, Inc. v. McLaney, 406 F. 2d 565 (5 Cir.), *cert. den.*, 395 U. S. 922 (1969); United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc., 404 F. 2d 706 (9 Cir. 1968), *cert. den.*, 394 U. S. 921 (1969); Hurley v. Northwest Publications, Inc., 398 F. 2d 346 (8 Cir. 1968), *aff'g* 273 F. Supp. 967 (D. Minn. 1967); Walker v. Pulitzer Publishing Co., 394 F. 2d 800 (8 Cir. 1968); Thompson v. Evening Star, 394 F. 2d 774 (D. C. Cir. 1968); Washington Post Co. v. Keogh, 365 F. 2d 965 (D. C. Cir. 1966), *cert. den.*, 385 U. S. 1011 (1967); Cerrito v. Time, Inc., 302 F. Supp. 1071 (N. D. Cal. 1969); Sellers v. Time, Inc., 299 F. Supp. 582 (E. D. Pa. 1969), *aff'd*, — F. 2d — (3 Cir., Mar. 20, 1970).

from which a jury could find that a statement was made with actual malice.[15] We thus proceed to an examination of the record, viewing it and the inferences which might be drawn therefrom in the light most favorable to Bon Air,[16] to ascertain whether "the record established by [Bon Air] demonstrate[s] that there is no issue of fact from which a jury could find 'actual malice.'" *Time, Inc. v. McLaney, supra* at 567; see Rule 56(e), Fed. R. Civ. P.

The complaint alleged that the article as a whole was defamatory and that ten specific statements in the article were false and libeled Bon Air: (1) The hotel has a "white-washed face"; (2) the hotel is staffed with ancient waiters in white coats who "tumble drowsily through the dining room"; (3) the hotel management's attitude toward its guests is that of "stay-at-your-own-risk"; (4) the hotel is being gradually converted into a "residence for the elderly"; (5) halls "sloped awkwardly" toward the rooms; (6) rooms are "wide enough so that by turning sideways a guest can walk between the bed and the dresser"; (7) "Windows are of two types. If, upon entry, a window is up it is not likely ever to come down, especially if the evening is brisk. On the other hand, if the window is down, it will never go up."; (8) tubs and basins were never "worth much"; (9) sleeping accommodations are described: "Sleeping at the Bon Air has long been difficult for reasons other than the heat or the cold or the hardness of the beds.

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15. Wasserman v. Time, Inc., — F. 2d — (D. C. Cir., 1970) [No. 23,267, Mar. 3, 1970]; Goldwater v. Ginzburg, 414 F. 2d 324 (2 Cir. 1969), *aff'g* 261 F. Supp. 784 (S. D. N. Y. 1966); Ragano v. Time, Inc., 302 F. Supp. 1005 (M. D. Fla. 1969), *appeal filed* (5 Cir.); *cf.* Pape v. Time, Inc., 419 F. 2d 980 (7 Cir. 1969), *rev'g* 294 F. Supp. 1087 (N. D. Ill. 1969) (evidence of actual malice sufficient to go to jury); Stearn v. MacLean-Hunter, Ltd., 46 F. R. D. 76 (S. D. N. Y. 1969) (complaint sufficient to state cause of action).

16. United States v. Diebold, Inc., 369 U. S. 654, 655 (1962); Goldwater v. Ginzburg, *supra* at 337; Time, Inc. v. McLaney, *supra* at 571-72.

It is noisy. Not the least amount of noise sometimes is caused by the clacking of highheeled shoes going down the fire escape outside a guest's window at 4 a.m.''; and (10) the hotel has a ''sellout crowd'' for the week of April 6 through April 12, 1964. Bon Air also objected to a drawing of the hotel at the beginning of the article.

Jenkins in writing the article relied on interviews with persons who had stayed at the Bon Air, researched the files of Time, Inc. with respect to Augusta and its background, and drew upon his thirteen years' attendance at the Tournament in Augusta and also upon the occasions when he was a registered guest or visitor at the hotel. After the article was completed and a month before its publication, a Sports Illustrated researcher, Sarah Pileggi, checked the article for accuracy by telephone conversations, by personal interviews, by consuling Time, Inc. files and by reading relevant published sources on golf tournaments and Augusta. Pileggi also sent a list of questions concerning specified statements in the article to Sports Illustrated's Atlanta correspondent, Jim Minter, who with assistance from an Augusta newspaperwoman checked the accuracy of these items. Detailed answers were returned and are included in the affidavits.

The district court examined the article and, in particular, the ten alleged defamatory statements in light of the various affidavits and answers to interrogatories in the record and found ''that no proof was adduced that had 'the convincing clarity which the constitutional standard demands.' ''. This finding is clearly supported by the record. Jenkins relied on his own experiences at the Bon Air in making many of the statements and, in addition, had the article thoroughly investigated for accuracy by members of Time's research staff. The affidavits and answers to interrogatories in the record demonstrate the thoroughness of the research conducted by Time's staff. Bon Air pre-

sented no evidence that Time or Jenkins published the statements with knowledge of their falsity or with "serious doubts as to the truth of [the] publication." *St. Amant v. Thompson*, 390 U. S. 727, 731 (1968); *Time, Inc. v. McLaney*, *supra* at 572-73.

Two alleged defamatory statements merit further discussion: (1) the statement that the hotel had a "whitewashed face" and (2) the sketch of the hotel at the beginning of the article. In investigating the accuracy of the article, Time's researchers gave three different answers: that the hotel was—white-yellowish color, that it was painted outside white, and that it was painted a dazzling white.

At the beginning of the article Time published a sketch of the hotel and surrounding grounds by Marc Simont, who had visited the hotel several times during the preparation of the sketch. Bon Air objected to two areas of the sketch: at the far end of the hotel three wooden braces support the outer hotel wall, and near the swimming pool a small amount of trash covers the ground. The researcher's report stated that during her inspection of the hotel the grounds were clean. In addition, Time admitted that the hotel walls were not supported by wooden braces.

These statements are clearly not 100% accurate. Truth or falsity, however, is not the constitutional test; the statements must be published with actual knowledge of their falsity or with reckless disregard for their falsity. We are not convinced that Time's decision to describe the hotel as having a "whitewashed face," instead of a "white-yellowish face," an "outside white face," or a "dazzling white face," is evidence that the statement was published with actual malice.[17] In publishing the sketch of the hotel,

17. "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Towne v. Eisner, 1918, 245 U. S. 418, 425.

as explained in its affidavits, Time attempted to convey to its readers, in what amounts to a cartoon, the condition of the hotel as described in the article.[18] Again, the evidence presented by Bon Air is not sufficient proof that the sketch was published by Time with actual malice.[19]

Freedom of expression must have a necessary breathing space if it is to survive.[20] If these statements raise factual issues of actual malice, that necessary breathing space becomes almost meaningless. As has been noted, actual malice is a constitutional issue to be determined initially by the trial judge on motion for summary judgment. We are convinced that Bon Air has not presented issues of fact from which a jury could find that Time published the article with actual knowledge of its falsity or with a reckless disregard as to whether or not it was false.[21]

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18. We would be confronted with an entirely different situation if a true photograph of the hotel had been used with additional pictures of wooden braces and trash superimposed on the photograph.

19. The decisions in Wasserman v. Time, Inc., — F. 2d — (D. C. Cir., Mar. 3, 1970), and Ragano v. Time, Inc., 302 F. Supp. 1005 (M. D. Fla. 1969), are distinguishable. *Wasserman* involved the same factual situation as *Ragano*. Time had published a photograph of seven men sitting in a restaurant in Queens, New York. The article referred to the men as "top Cosa Nostra hoodlums," even though Time *knew* that Wasserman and Ragano were present with the other five men only in an attorney-client relationship. This was sufficient proof of actual malice to survive Time's motion for summary judgment.

20. New York Times Co. v. Sullivan, *supra* at 285-86.

21. The following statement by Judge Tuttle in *McLaney* seems pertinent here:

> "Where . . . it is plain that the record has been fully developed by depositions and affidavits on a motion for summary judgment, and such record demonstrates that, construing all of the facts and inferences to be drawn therefrom in favor of the party against whom the judgment is entered, he would not be entitled to have a jury verdict stand, we have not hesitated to hold that the grant of summary judgment is proper."

406 F. 2d at 571-72.

For these reasons we conclude that the district court did not err in granting Time's motion for summary judgment. The judgment is

AFFIRMED.